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No. .....

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed August 20, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,
Plaintiffs,

AND

UNITED STATES OF AMERICA, et al.,
Plaintiff-Intervenors,

VS.

WILLIAM C. FRIDAY, et al,
Defendants.

JUDGMENT ON CLASS-WIDE CLAIMS

For the reasons stated in the court's memorandum of decision this day filed it is now

ORDERED, ADJUDGED AND DECREED that the United States as plaintiff-intervenor is not entitled to recover of the defendants, or any of them, by reason of any matters alleged in the original complaint in intervention or the amended complaint in intervention and that the action of the plaintiff-intervenor be and the same is hereby dismissed with costs.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 20, 1982.

By s/s
Deputy Clerk

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VS.

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Defendants.

MEMORANDUM OF DECISION
(CLASS-WIDE CLAIMS)

This action instituted in this court on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (Extension Service) alleging racial discrimination in

employment and the provision of services came on for trial in December, 1981, and was tried to the court without a jury over a period of approximately ten weeks.[1] In this memorandum of decision the court will record its findings of fact and conclusions of law in conformity with Rule 52, F.R. Civ. P.

BACKGROUND

The action was based on alleged viotions of the First, Fifth and Fourteenth Amendments to the Constitution, 42 U.S.C. §§ 1981, 1983 and 2000d, and 7 U.S.C. §

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[1] To some extent the inordinate delay between the filing date of the suit and trial is attributable to docket conditions in this court over the last ten years, but perhaps to a greater extent to the action (and sometimes inaction) of the parties in obtaining amendments to the pleadings, extensions of time to complete discovery, motions for continuance, failure to press for a trial and their intermittent assurances to the court that a settlment of all matters in controversy was probable.

341, et seq. The United States intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1. Named originally as defendants in the action, the Secretary of Agriculture and the Administrator of the Federal Extension Service were re-aligned as plaintiff-intervenors on July 21, 1972.

The United States amended its complaint in intervention on February 28, 1975, to include allegations of racial discrimination against black and Indian employees in violation of Section 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.

The defendants are William C. Friday, President of the University of North Carolina (which comprises the sixteen

institutions of higher education in the state), the Chancellor of North Carolina State University, the Director of the Extension Service, the Board of Governors of the University of North Carolina, North Carolina State University (NCSU), and its School of Agriculture of which the Extension Service is a part; and Alamance, Edgecombe and Mecklenburg Counties.

In addition to their answers containing general denials the defendants filed a third-party complaint against the Secretary of Agriculture and the Administrator of the Federal Extension Service alleging discriminatory application of the civil rights regulations of the Department of Agriculture. The order re-aligning the parties ordered that this third-party complaint be treated as a counterclaim.

North Carolina State University, a land grant university located at Raleigh, administers the state's extension program the purpose of which is to aid in the dissemination of "useful and practical information on subjects relating to agriculture and home economics." Funds for the program are provided by the federal government under the Smith-Lever Act of 1974 (7 U.S.C. § 341, et seq.); by the State of North Carolina and each of the 100 counties in the state in the approximate ratios of forty per cent federal, forth-three per cent state and

seventeen per cent county.[2]

The Extension Service is a division of the School of Agriculture and Life Sciences at NCSU at Raleigh. The present head of the Extension Service is its Director, Dr. Chester Black who assumed the position on January 1, 1982. Dr. Black, a white male, is also Associate Dean of the School of Agriculture and Life Sciences. He is directly responsible to the Dean of that school and ultimately responsible to the Chancellor or NCSU, its Board of Trustees, the President of the University of North Carolina and the Board

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[2] Prior to 1978 funds for extension programs carried out by North Carolina A & T State University (A&T), a predominantly black institution located at Greensboro, North Carolina, were made available through the State Director of Cooperative Extension, but since then have been appropriated un-der Section 1444 of the Food and Agri-cultural Act of 1977 (1890 Program) and are made available tothe Administrator of the 1890 Extension Programs at A & T.

of Governors of the University of North Carolina for the operations of the Extension Service. The position of Director of the Extension Service has always been held by a white male.

Responsibilities of the Director include programming, planning, managing, personnel, staffing, budgeting, staff organization, selection of staff, assignment, promotion of personnel, and the development and implementation of policies relating to employment and the delivery of services of the organization.

The Associate Director of the Extension Service holds the second highest position in the organization. Prior to his elevation to the directorship on January 1, 1982, the position of Associate Director was held by Dr. Black. Responsibilities of the position include overall

administration, budget and organizational management. This position has always been held by a white male.

Directly beneath the Associate Director are five Assistant Directors of the Extension Service, each with responsibility in one of these areas: staff development, 4-H, home economics, agriculture and special programs and county operations. The Assistant Director for Home Economics is a white female. The remaining four Assistant Directors are white males.

The state is divided into six districts, the north central, northeastern, northwestern, southeastern, southwestern and western. Each district is headed by a District Extension Chairman who is responsible for administering all Extension Service programs within the district. He or she coordinates the program efforts

of all agents and specialists within the district, interprets administrative policy, develops and maintains budget for the district and makes recommendations to the Director with respect to the hiring, promotion and salaries of personnel within the district. Of the District Extension Chairmen at this time one is a black female, one is a white female and the remaining four are white males.

The top administrative position in the Extension Service in each of the 100 counties of North Carolina is that of the County Extension Chairman. Under the supervision of the District Extension Chairman the County Chairman coordinates all Extension Service activities within his county and is responsible for developing an effective county extension program. He is responsible for organizing and allocating resources, preparing the

County's extension budget, making recommendations to the District Chairman with respect to the hiring, promotion, evaluation and salary of all county-level extension personnel. The County Chairman reports to the District Extension Chairman who reports to the Assistant Director for County Operations. The County Extension Chairman also reports to the Board of County Commissioners in his county on extension programs and matters relating to budgeting and personnel.

In addition to the employees in the managerial chain of command the Extension Service employs some twenty-five or more "Specialists" whose responsibilities are to provide technical assistance to the agents in the counties. Most of the Specialists are employed at NCSU in Raleigh. Their areas of responsibility include such subjects as adult and

community college education, agricultural communications, animal husbandry, dairy husbandry, food science, 4-H, home economics, horticulture and wildlife. A Specialistsis one who has technical expertise in a particular subject matter and/or does research in a particular area or matter and renders technical assistance in that field. They keep agents and recipients of extension services informed of new developments within their areas of specialization, assist in planning, implementing and evaluating extension programs. Most Specialists serve the entire state, but a few of them work within a limited geographic area. Approximately two-thirds of the Specialists have PhD degrees.

There are twelve district program leaders with responsibility for specific programs in the areas of home economics,

agriculture, community development and 4-H in assigned districts. Program leaders also kprovide admi8nistrative assistance to the District Extension chairman with respect to personnel and programs within the districts to which they are assigned.

There are two positions for state agents in home economics, and at the present time one of the positions is filled by a white female and the other by a black female. The latter is primarily responsible for the Extension Service's Expanded Food and Nutrition Education Program (EFNEP).

The Extension Service renders services in four major extension program areas: home economics, agriculture, 4-H and youth, and community resource development.

The home economics program helps families solve problems and improve the quality of their lives in the areas of food, nutrition and health; housing, energy and environment; clothing and textiles; family resource management; and human development and aging through educational programs and an extensive volunteer organization within each county.

There are three ranks of home economics agents: home economics agent, associate home economics agent and assistant home economics agent. Ordinarily these positions are held by females.

One of the functions of the home economics agents at the county level is to help women organize "homemaker clubs." These clubs are associations of women who receive lessons in home economics from the county agents and from their own members. Although membership in these clubs is

entirely voluntary, home economics agents regularly meet with the clubs, give lessons to them and train individual club members to give home economics lessons to their members.

Another function of the Extension Service is to operate the EFNEP program the purpose of which is to improve the diets of poor families and to increase their effective utilization of public assistance food programs. The program uses non-college graduate para-professionals as "program aides" who work on a part-time basis under the day-to-day supervision of the county home economics agent responsible for the food and nutrition program in the county. The majority of the clientele served by this program is black, and the program is financed primarily by federal funds.

There are three ranks of agricultural extension agents: agent, associate agent and assistant agent. To qualify for the position of full agent formerly required a minimum of seven years' experience with the Extension Service or equivalent experience. Since 1979 it has been six years. The position of associate agent requires a minimum of three years' experience with the Extension Service or equivalent experience, and the position of assistant agent which is the position into which one is initially employed requires no previous experience. While the three ranks of agents perform essentially the same types of tasks, when an agent is promoted his responsibilities increase and a higher level of performance is expected of him.

Each agricultural agent is assigned particular areas of responsibility by the County Chairman, and the areas of respon-

sibility normally assigned are the crops grown in the county and specific livestock. Both agricultural agents and home economics agents can also be assigned to 4-H and community development.

The 4-H and youth program is operated in each of the 100 counties of the state and on the Cherokee Indian reservation. This program is designed to develop good character and citizenship and to teach youth useful and practical skills. Participants have the opportunity to select from nearly fifty different areas of study including archery, beef, clothing, foods and nutrition, home environment, bicycle repair and safety, electricity, entomology, horticulture, conservation, forestry and veterinary science. The Specialists at NCSU and A & T prepare

the subject matter instruction and related activities that attract 4-H youth to the program.

One of the functions of the county agents assigned 4-H as an area of responsibility is to help organize and serve 4-H clubs. Prior to the early 1960's these clubs were organized in the public schools and county 4-H agents would meet with the clubs during school hours and present educational programs to them. Thereafter the clubs were moved out of the schools and were organized on a community basis with adult volunteers serving as leaders of the clubs.

Community resource development (CRD) programs deal primarily with problems that require group or community action. The CRD programs vary from county to county depending on the needs of the counties over a period of time. Many of the

counties have developed programs that are similar in nature such as land use planning and organization of volunteer fire departments.

EMPLOYMENT WITHIN THE EXTENSION SERVICE

The salaries of Extension Service agents and county chairmen consist of a federal share, a state share and a county share. The federal government allocates a sum of money to the Extension Service each fiscal year, and the boards of county commissioners in each of the one hundred counties in the state, in conjunction with the Extension Service, determine how much each county will pay agents at the time they are hired. The county chairmen make recommendations to the county commissioners as to what the professional staffs' salaries should be. Some extension agents, such as those who work with the EFNEP, receive only federal funds.

The Extension Service has the responsibility to establish minimum requirements and qualifications for employment; to generate, receive and examine applications; to interview and screen applicants to determine their qualifications and availability; to recommend to county commissioners qualified applicants for appointment to vacant or new positions; to recommend the salaries of extension agents; to determine jointly with the county board of commissioners the share of salaries to be paid by each and to provide the state and federal share of these salaries; to prepare and submit an annual budget request to the board of commissioners for the county share of funds for salaries and expenses; to provide funds for travel in the conduct of extension

work; and to provide extension agents with official bulletins, leaflets and other publications for educational purposes.

The Extension Service also has responsibility for the administration and supervision of extension programs and personnel and to develop and administer a personnel management system that provides for (a) the annual review of each worker's performance, (b) counseling for job improvement where needed, and (c) periodic county program reviews. It provides a staff of specialists to train agents in technology and other changes affecting agriculture, home economics, 4-H and CRD and assists in the conduct of work in these areas. It provides extension workers with training program and develops and maintains a county advisory leadership system in each county.

These responsibilities of the Extension Service are set forth in a "Memorandum of Understanding" between the Extension Service and the boards of county commissioners of each county (DX 79). This agreement also outlines the responsibilities of the boards of county commissioners which include the duty to provide the county's share of salaries for extension personnel; to provide office space and equipment, utilities, telephone, office supplies, demonstration materials and other items needed for the efficient operation of the county extension office and program; to review and consider the annual budget request from the Extension Service and take appropriate action by July 1 of each fiscal year; and to confer and advise with district and county extension chairmen and extension advisory council relative to county extension

programs. With respect to employment practices the Extension Service and commissioners mutually agree as follows:

> "That all county extension appointments and separations are to be worked out jointly between the North Carolina Agricultural Extension Service and the Board of County Commissioners, and that no official action will be taken by either party regarding appointment or separation prior to discussion of the matter with the other party."

Since November, 1972 a monthly announcement of vacant county positions has been sent from the office of the Assistant Director of the Extension Service for county operations on the fifteenth of each month to all Extension Service offices in the state and certain universities. The announcement sets forth the area of responsibility, date the position is available and location and deadline for applying. Prior to December, 1980 the Assistant Director for County Operations

reviewed each application and acknowledged its receipt by letter. That function is now handled by a personnel specialist under the direction of the Associate Director of the Extension Service. To be considered from the outside for a professional position an applicant must have an overall 2.5 grade point on a 4.0 scale or a 3.0 grade point in the applicant's major field.

When a county chairman requests permission to fill a vacancy and that request is approved, the district chairman requests, and is provided, a list of applicants in the subject matter area by the personnel specialist. They review the list and obtain applications to consider for a specific position from personnel files. Applicants who possess qualifications deemed appropriate for specific positions are interviewed by district

chairmen and district program leaders. After the interviewing procedure has been completed, one or more applicants will be asked to visit with the county chairman and staff in the county in which the vacancy exists. After consultation with the county chairman and Assistant Director, County Operations, a decision is made as to who will be recommended for the position. The district chairman, working with the Assistant Director, County Operations, suggests the salary to be offered the applicant subject to county approval. The county chairman then presents the recommendation to the Board of County Commissioners or county manager for approval. Following approval the Director of the Extension Service makes the appointment.

Since 1972 the Extension Service has used throughout the state a standardized performance evaluation instrument called a "Performance Review Guide." The guide was revised in 1976, and it is used primarily as a counseling and evaluative tool. A separate Performance Review Guide for county chairmen was developed in 1970-71 and revised in 1978.

EXTENSION SERVICE PRIOR TO 1965

Prior to August 1, 1965, the Extension Service was divided into two branches, a white branch (which had no formal racial designation) and a Negro branch. The Negro branch was composed entirely of black personnel and served only black farmers, homemakers and youth. The white branch employed no blacks but did on occasion serve blacks. Both branches were headed by the Director of

the Extension Service who was white and who had the responsibility for the total operation of the service.

The Negro branch had its headquarters at A & T in Greensboro, North Carolina, an agricultural and technical college maintained by the state for the education of Negroes. The Negro branch of the Extension Service was divided into three geographical districts and maintained offices in fifty-one of the state's one hundred counties. The Negro county offices were separated from the offices maintained for white personnel.

The Negro branch of the Extension Service was headed by the "Negro state agent," a black male, who was responsible directly to the Assistant Director of Extension Service at Raleigh, both of whom were white. The responsibilities of the Negro state agent included the hiring,

assignment, salary determination, promotion, transfer, discipline and discharge of all black personnel. He also was responsible for developing the budget and a state plan of work for the Negro branch and for supervising the work of all black employees.

In each of the fifty-one counties in which the black branch of the Extension Service had offices the black organization had a counterpart in the white organization. There was no interchange of personnel between the two organizations, but black and white county agents had identical responsibilities in formulating and presenting budgets to county commissioners, developing plans of work, meeting with clubs and conducting meetings. County agent job descriptions were identical except for the appellation "Negro work" for blacks.

The salaries of black agents in the segregated system were lower than the salaries of their white counterparts, and black agents had inferior office space and facilities in the segregated system.

On August 1, 1965, which was shortly after the effective date of the Civil Rights Act of 1964, the white and Negro branches of the Extension Service were merged into a single organization with its headquarters at NCSU in Raleigh. To effectuate the merger the six white and three Negro geographic districts were eliminated and six new geographic districts were created. In conjunction with the merger various positions were eliminated and new positions were created. The position of Negro state agent at A & T was eliminated and the black male who had held this position, Mr. R. E. Jones, became an

Assistant Director of the Extension Service. He continued to maintain his office at A & T in Greensboro.

This unification and integration of the Extension Service did not result immediately in the elimination of some disparities which had existed between the salaries of white personnel and black personnel, and during the course of the transition from a segregated to an integrated system some black agents and black female home economics agents lost some of their job responsibilities.[3]

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[3] Conditions as they existed before the merger and their effects on post-merger conditions are set forth only as relevant background evidence in connection with the Title VII claims in this case which did not arise until March 24, 1972, the effective date of the amendments to the Civil Rights Act of 1964 pursuant to which public employers became subject to the Act.

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a dis-criminatory act which occurred

The foregoing findings are designed to afford an overview of the employment practices of the Extension Service and the two branches of the service which existed before the merger in 1965. More detailed facts are contained in the proposed findings of fact submitted by the parties, and the court adopts as its own and incorporates herein by reference portions of such proposed findings as follows:

Plaintiff-Intervenor (hereinafter "the government": Findings numbered 12-37 inclusive; 46; 48 - 59 inclusive; 66-71 inclusive; 73 and 74.

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before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately con-sidered,it is merely an unfortu-nate event in history which has no present legal consequences." United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

Defendants: Findings numbered 5-35 inclusive together with all stipulations of fact set forth in the pre-trial order.

THE CLASS ACTION QUESTION

This action was originally instituted in the names of sixty-five individual plaintiffs, seemingly large enough to constitute a class within themselves, but they nevertheless alleged "across the board" discrimination and sought to have the action certified as a class action under Rule 23, F.R. Civ. P. It was proposed that a plaintiffs' class be certified to include all black employees of the Extension Service who have been subjected to employment discrimination by defendants; all black persons in North Carolina who have been denied services or provided inferior services by the Extension Service; all black females in North Carolina who have been excluded from

membership in all white extension homemaker clubs solely because of their race; and all black children in North Carolina who are excluded from all white 4-H clubs solely because of their race.[4]

Plaintiffs also proposed that a defendants' class be certified to include the boards of county commissioners of all one hundred counties in North Carolina.

Mindful of the principle adopted in this circuit and most recently applied in Goodman v. Schlesinger, 584 F.2d 1325 (4th

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[4] In paragraph 5 of an amended complaint filed November 30, 1981, it is alleged that the plaintiffs are "black citizens of the United States and the State of North Carolina," but in paragraph 14 of the amended complaint it is alleged that "defendants have pursued and continue to pursue policies and practices that discriminate against black and Indian individuals with respect to their compensation, terms, conditions and privileges of employment," and class-type relief is sought on behalf of Indians as well as blacks. No Indian testified at the trial and no Indian has come forward to assert a claim in this action.

Cir. 1978), that certification of a class may await the completion of discovery, the court deferred final decision on the question of class certification pending completion of discovery. Meanwhile, pursuant to 42 U.S.C. § 2000h-2 the United States intervened in the action and thereafter the named plaintiffs and the government joined forces in the prosecution of the action.

Limited originally to allegations of violations of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, by order of October 9, 1979, the government's complaint in intervention was allowed to be amended to assert a cause of action under Title VII of the Civil Rights Act. As previously stated, on the eve of trial the named plaintiffs were allowed to file an amended complaint alleging violations of Title VII whereupon the

discrimination claims of both the named plaintiffs and the government became identical.

The order of October 9, 1979 also denied all motions to certify the action as a class action, and the motion of the named plaintiffs to reconsider this order was denied by order of July 29, 1981.[5] As recent as the final arguments herein following trial the named plaintiffs have continued to insist that the action be certified, and in their pre-trial brief

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[5] On June 3, 1975, the government had filed a motion to certify the action as a class action. It proposed five classes of blacks and Indians and a defendant class consisting of the then 477 county commissioners representing the one hundred counties in the state. Since the October 9, 1979 order the government has not pressed its class action claim further.

the named plaintiffs have proposed four classes of plaintiffs and one class of defendants as follows:[6]

> (1) All Black and Indian employees and potential employees of the NCAES since November 18, 1971, and thereafter;
>
> (2) All Black and Indian persons who were recipients or potential recipients of service from the NCAES on November 18, 1971, and thereafter;
>
> (3) All Black and Indian members or potential members of the NCAES's 4-H Clubs on November 18, 1971, and thereafter;
>
> (4) All Black and Indian persons who were members or potential members of the NCAES's Homemaker Clubs on November 18, 1971, and thereafter; and
>
> (5) All County Commissioners in North Carolina, in their official capacities, on November 18, 1971, and thereafter.

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[6] Contrary to the statement in the brief that the proposed classes were set forth in plaintiffs' original complaint filed November 18, 1971, the word "Indian" appears for the first time in any pleading filed by the named plaintiffs in their amended complaint filed November 30, 1981, one week before the trial began.

In light of the evidence developed at trial and further case law developments since the order of October 9, 1979, the court remains of opinion that this is not a proper action for class certification either as to plaintiff or defendant classes. It is settled, of course, that employment discrimination cases are not entitled to class certification as a matter of course, but instead the requirements of Rule 23 must be satisfied as in all other type cases. East Texas Motor Freight v. Rodriquez, 431 U.S. 395 (1977); Kelley v. Norfolk and Western Railway Company, 584 F.2d 34 (4th Cir. 1978).

The plaintiffs apparently canvassed the entire state and were able to come up with fifty-five individuals, all black, who were willing to join in the suit as named plaintiffs. They apparently seek to

head a class consisting of "all black and Indian employees and potential employees of [the Extension Service] since November 18, 1971 and thereafter" who would present claims of discrimination in employment. There was no evidence at the trial that there exists any other potential class members who have been subjected to any alleged discriminatory employment practices of the defendants.

Five black farmers were named as plaintiffs, presumably to head a class of black people allegedly denied services or provided inferior services by the Extension Service solely because of their race, but none of these plaintiffs testified at the trial and there was no evidence whatever to support the allegations of the denial of services or the provision of inferior services by the Extension Service to anyone because of race.

Two black females, members of extension homemaker clubs, were named as plaintiffs presumably to head a class of black females allegedly denied membership in all white extension homemaker clubs and denied services or provided inferior services by the Extension Service solely because of their race. Neither of these plaintiffs testified at the trial, and there was no evidence whatever that any black female has at any time since the institution of this action been denied membership in any Extension Service homemaker club or has been denied services or provided inferior services by the Extension Service because of race.

The fathers of three black children who are members of 4-H clubs were named as plaintiffs, presumably to head a class of black children allegedly denied membership in all white 4-H clubs and denied services

or provided inferior services by the Extension Service solely because of their race. Neither of these plaintiffs nor their children testified at the trial. The only evidence of any discrimination toward a black child in 4-H club membership related to one isolated instance in which a voluntary worker attempted to discriminate against a black child, and this resulted in the prompt removal of the offending worker by the Extension Service. There was no evidence whatever that any other black child was ever denied membership in a 4-H club or was denied 4-H services or provided inferior services by the Extension Service.

What we are left with are the bare, conclusory allegations of the complaint to establish numerosity of affected parties, commonality of questions of law and fact and typicality of claims and defenses as

required by Rule 23(a). Numerous cases hold that this is not sufficient, one of the more recent of which is Wright v. Whitehall School District[7], 94 F.R.D. 80 (E.D. Ark. 1981).

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[7] The named plaintiffs and the government have been represented by exceptionally able counsel throughout this litigation, and the court does not reach the question of whether as representative parties these plaintiffs satisfy the requisites of Rule 23(a)(4) under the principles set forth in Rodriquez, supra, and Hill v. Western Electric Company, Inc., 596 F.2d 99 (4th Cir. 1979), cert. denied, 444 U.S. 929 (1979). It may be said, however, that in no event could these black plaintiffs represent a class including Indians in this action. Neither the original complaint nor the motion to amend the complaint (filed in open court on November 23, 1981) made any mention of Indians. The motion to amend simply asked leave to assert a cause of action under Title VII on behalf of seven named plaintiffs who had filed charges and obtained right-to-sue letters from the EEOC. Any further allegations of the amended complaint were not authorized by the order allowing the amendment.

Another line of cases supports denial of class certification here because of the multiple employing units involved (one hundred counties each providing funds and maintaining a voice in as well as the veto power over all employment decisions at the county level). Representative of these cases are Stastny v. Southern Bell Telephone and Telegraph Company, 628 F.2d 267 (4th Cir. 1980), and Doninger v. Specific Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977).[8]

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[8] Compare Penk v. Oregon State Board of Higher Education, 93 F.R.D. 45 (D. Ore. 1981) (geographic diversity of eight member units of the University of Oregon did not preclude class certification where it appeared that the state board generated policy decisions and guidelines for hiring in the entire system, the member units had no statutory autonomy to make employment decisions, and the board received a single budget appropriation and wrote all payroll checks).

In Stastny Judge Phillips, quoting from Harris v. Pan American World Airways, Inc., 74 F.R.D. 24 at page 41 (N.D. Cal. 1977), identified a key question to be considered in assessing the commonality criteria of Rule 23(a) in Title VII as follows:

> "How uniform or diverse are the relevant employment practices of the employer, considering matters such as: size of the work force; number of plants and installations involved; extent of diversity of employment conditions, occupations and work activities; degree of geographic dispersion of the employees and of intracompany employee transfers and interchanges; degree of decentralization of administration and supervision as opposed to the degree of local autonomy."

On the record presently before the court it clearly appears that the commonality requirement has not been satisfied.

Finally, and perhaps most importantly, we have here the unusual, if not

indeed unique situation in which the government exercised its authority under 32 U.S.C. § 2000h-2 to intervene in a private suit grounded on employment discrimination. Three years after the 1972 amendments to Title VII subjecting state agencies to its provisions the government sought and was granted leave to amend its complaint in intervention to allege a cause of action based on Title VII. As stated before, the named plaintiffs on the eve of trial obtained a similar amendment to their complaint. Thereafter the cases proceeded as one with the named plaintiffs and the government making common cause against the defendants. Thereupon for all intents and purposes the suit became a class action, for it is now settled law that class action certification is inappropriate and unnecessary in pattern and practice suits

brought by the EEOC and the government pursuant to Title VII. General Telephone Company v. EEOC, 446 U.S. 318 (1980). If the government prevails herein the relief granted can be as broad as any that could be granted in any private class action suit.[9] United States v. Masonry Contractors Association of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974); United States v. Georgia Power Company, 474 F.2d 906 (5th Cir. 1973).

For the foregoing reasons the court adheres to its previous rulings denying class certification for plaintiffs' classes in this action. What has been said with reference to the denial of class

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[9] Indeed the government has submitted a proposed decree which embodies almost every conceivable kind of injunctive relief including back pay, and if such decree were entered, the named plaintiffs as prevailing co-parties would appear to be entitled to attorney fees under 42 U.S.C. § 1988.

certification for the proposed plaintiffs' classes also suffices to justify denial of the proposed class of defendants consisting of all the county commissioners in the state.[10] There was simply no evidence of

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[10] In urging certification of defendants' class plaintiffs have taken a position seemingly contradictory to their position on the plaintiffs' class question. On the one hand they argue that the defendants' policies emanate from a central source and that these policies have a uniform discriminatory impact on the plaintiff class, while in an effort to obtain certification of a defendant class plaintiffs are obliged to argue that the counties and county commissioners have made it their statewide practice to discriminate against blacks in the areas of employment, working conditions and provision of services. It would seem apparent that if the practices complained of originate from a central core that the plaintiffs can obtain the relief desired without the certification of a defendant class. Any attempt to impose liability on the counties under a theory of vicarious liability as was done in Commonwealth of Pennslyvania v. Local 542, 469 F. Supp. 329, at pp. 411-413 (E.D. Pa. 1978), aff'd, 648 F.2d 923 (3rd Cir. 1981) would seem now to be foreclosed by the Supreme Court's reversal of those cases. General Building Contractors Association, Inc. v. Pennslyvania, ___ U.S. ___, 50 U.S.L.W. 4975, 4979-80 (June 29, 1982).

any standardized practice among the one hundred separate counties in the state to deprive anyone of any rights solely because of race. Prior to the merger of the two branches of the Extension Service there were forty-nine counties in which there were no black agents, and in many counties of the western part of the state the percentage of Negroes in the population is minuscule.

Case law supports this determination. United States v. State of South Carolina, 445 F.Supp. 1094 (D.D.C. 1977), summarily affirmed, 434 U.S. 1026 (1978) (plaintiff's attempt to certify a class of defendants consisting of ninety-two South Carolina school districts rejected); Greenhouse v. Greco, 617 F.2d 408 (5th Cir. 1980) (each church corporation within a diocese was legally autonomous subject

to bishop's authority only by virtue of religious obedience to canon law. Bishop had no legal power to carry out an integration decree of a federal court).

For these reasons the court adheres to its previous rulings denying certification of a defendants' class in this action.

THE LIABILITY ISSUES

As previously stated, the amended complaint filed by the named plaintiffs on November 30, 1981, and the government's amended complaint in intervention which was allowed to be filed by the order of October 9, 1979, contained essentially identical allegations of discrimination.[11]

[11] The government's motion for leave to file an amended complaint was filed on February 28, 1975. In addition to duplicating the charges made by the named plaintiffs in their original complaint the proposed amended complaint attached to the motion contained allegations of violations of Title VII on grounds of racial and sex discrimination. The order allowing the

It is alleged in each of the amended complaints that the defendants have implemented policies and practices of racial discrimination by

> (a) maintaining prior to 1965 a racially dual system of Extension Service employment and continuing to assign black ... employees only to counties which had black ... employees prior to 1965;

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filing of an amended complaint entered October 9, 1979, limited the allegations of discrimination to those based on race. So far as the court has been able to find in this bulky, ten-year-old record the government never filed an amended complaint, but the parties have proceeded as if such complaint had been filed, and the court has therefore accepted the government's proposed amended complaint as attached to its motion as its amended complaint but has disregarded the allegations charting sex discrimination as to which no evidence was offered at the trial.

While the government alleged discrimination against Indians in its amended complaint (but not in its original complaint in intervention) without objection on the part of defendants, no evidence was adduced at the trial relating to Indians, and the motion of defendants to dismiss the claims of all parties relating to discrimination against Indians will be allowed in a separate order.

(b) failing to recruit, hire, assign and promote blacks .. on a (sic) equal basis with whites;

(c) denying blacks .. the same compensation, terms, conditions and privileges of employment as provided to whites;

(d) segregating blacks ... in work assignments;

(e) failing or refusing to establish valid qualifications, tests, selection standards and procedure which are sufficiently objective to prevent continuing discrimination in hiring and promotion;

(f) failing or refusing to take appropriate action to correct the present effects of past racially discriminatory policies and practices;

(g) failing to provide minorities with services equal to those provided to white persons; failing to provide services to 4-H Clubs, Extension Homemaker Clubs, farmers and other persons on a non-racially segregated basis; and

(h) failing to maintain non-racially segregated 4-H Clubs and Extension Homemaker Clubs.

In addition to general denials the answers of defendants to the amended complaints pled the three-year statute of limitations, failure of the individual plaintiffs to file charges with EEOC within 180 days of the alleged discriminatory acts of defendants, good faith, waiver and the Eleventh Amendment.[12] The issue thus joined by the pleadings will be discussed in the sections of this memorandum to follow.

I. Discrimination in Work Assignments - Geographical.

The allegation that defendants assigned black employees only to those counties which had black employees prior to 1965 has not been supported by the evidence. Rather, the evidence shows that

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[12] A counterclaim of defendants against the United States Department of Agriculture has been dismissed by separate order.

blacks are employed wherever they apply for employment in those counties (mostly in western North Carolina) where the Negro population is very small and the relative number of black farmers and prospective recipients of services offered by the Extension Service is even smaller.

The defendants' motion to dismiss this claim will be allowed.

II. Failing to Recruit, Hire, Assign and Promote Blacks.

1. Recruiting.

The government contends that defendants "have not established an affirmative recruitment and hiring program nor agreed to such a plan with the United States Department of Agriculture which would eradicate their prior discriminatory employment practices." The defendants, of course, deny that there were any "prior discriminatory employment practices." The

evidence showed that the Extension Service recruits agriculture and home economics graduates by making personal visits to campuses within North Carolina and nearby states offering degree programs in agriculture and home economics and by sending position vacancy announcements to colleges offering degrees in these subjects.

Vacancy announcements are sent to some of the more prestigious out-of-state schools with nationally recognized agriculture and home economics programs such as the University of Wisconsin, Southern University in Louisiana and Tuskegee Institute in Alabama. With the exception of the latter two institutions the Extension Service has not recruited at other predominantly black institutions outside North Carolina, and the government contends that had applicants been sought

at nineteen additional schools in the southern region with substantial black enrollments the number of agriculture and home economics graduates available would have been doubled. The evidence showed, however, that the Extension Service has always received a sufficient number of applicants to keep its position filled, and since an employer is under no legal duty to recruit applicants for employment absent a finding of discrimination followed by court ordered affirmative action, the defendants' recruiting practices in this case cannot be held to have been discriminatory. Rather, the court was left with the impression that the Extension Service's recruiting practices were designed to obtain the highest qualified applicants.[13]

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[13] That the best laid plans for recruitment may not be productive was illustrated by the experience Dr. Chester D. Black, the

The recruitment procedures employed by the Extension Service are set forth in more detail in defendants' proposed findings of fact 92(a) - 97 inclusive which the court adopts as its own and incorporates herein by reference.

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present Director of the Extension Service, had when he visited Tuskegee Institute in Alabama. Although he had written the institution to inform them that he was coming and that he wanted to interview potential applicants for positions in agriculture, the only person who showed up for interview was one with a master's degree in sociology "who expressed an interest in the possibility of working with extension work." Dr. Black stated that he was never able to hire anyone from Tuskegee, and he went on to testify that "I was awed by -- unless you have been through it and saw the recruitment effects put on by major companies -- the Ford Motor Company at the time I was there had a display that you would use at a State Fair to attract people to their company, and I was recruiting at a real disadvantage that day." Tr. 4493-5.

2. Hiring.

Hiring procedures of the Extension Service for positions at the state level differ from the procedures employed in filling county level positions. This is because state level positions require faculty appointment in the School of Agriculture and Life Science at North Carolina State University and are therefore subject to the selection and promotion criteria utilized by the University for filing vacancies on its faculty.

State level positions in the Extension Service generally require a minimum of a master's degree, and the majority require a PhD degree either in agriculture and home economics. Because of the very small number of blacks who obtain master's and Ph.D degrees in agriculture and home economics every year the labor pool from which the Extension Service can recruit

for positions at the state level is sharply limited. This alone is sufficient to account for the seemingly small percentage of blacks who hold state level positions in the Extension Service.

The selection procedures employed by the Extension Service in filling state level positions are set forth in more detail in defendants' proposed findings of fact Nos. 214-237 inclusive which the court adopts as its own and incorporates herein by reference. These procedures are non-discriminatory and have been employed in a non-discriminatory manner.

All applicants for entry level positions in the counties must have a bachelor's degree in an area related to the program responsibility to be assigned the agent, and a master's degree is highly desirable. Filling positions at the county professional staff level also

involves a consideration of the agricultural, social and economic needs of the particular county, and this in turn dictates the number of potential applicants who can qualify for a particular position.

When a vacancy in a county level position comes open or a new position is created, it is established for a particular subject matter responsibility. Prior to 1972 there were not a great many alternative employment opportunities for agriculture graduates, and consequently the turnover rate for county level employees was much smaller than it has been in recent years which have seen an increase in the number of large farms with an accompanying increase in employment opportunities for agriculture agents. Because of this small turnover rate it was felt that word-of-mouth notices of

vacancies and announcements in the Extension Service newsletter mailed monthly to all employees in the organization sufficed as adequate notice of employment vacancies. Since 1972 the Extension Service has sent monthly vacancy announcements to all offices within the state and to the educational institutions indicating the location, position and subject matter areas of responsibility required to fill the vacancy.

No evidence has been offered to show even one qualified black applicant who applied and was not accepted for employment in a county level position with the Extension Service. EEOC v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980); Shack v. Southworth, 521 F.2d 51, 55 (6th Cir. 1975); Eastland v. Freeman, 528 F. Supp. 862, 881 (N.D. Ala. 1981). It is perhaps significant also to note

that there is no allegation nor proof in this record that the Extension Service has ever discharged any employee on account of race.

The hiring procedures employed by the Extension Service in filling county level positions are set forth in more detail in defendants' proposed findings of fact Nos. 88-92 inclusive; and 98-102 inclusive which the court adopts as its own and incorporates herein by reference. These procedures are non-discriminatory and have been employed in a non-discriminatory manner which is further attested by the fact that historically the Extension Service has employed more black professionals that any state except Alabama, where the percentage of total population that is black is also higher. As of November, 1981, the Extension Service employed a total of 1,554 full and

part-time people. The figures include professionals at both the state and county level as well as all the para-professionals and other supporting staff. Of this total, 444 or 21.4 per cent were black. The latest census data shows that blacks represent 22.4 per cent of the state's total population. Given the difficulties of recruiting and retaining qualified blacks, it is apparent that the Extension Service has done a commendable job in its minority hiring program.[14]

3. Assignments

There is some evidence that following the merger of the white and black branches of the Extension Service in 1965

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[14] More detailed facts concerning the difficulties of recruiting and retaining qualified blacks are set forth in defendants' proposed findings of fact Nos. 250-254 inclusive which the court adopts as its own and incorporates herein by reference.

blacks, who had previously worked "across the board" in all subject matter areas of responsibility, were assigned to more limited areas of responsibility and that whites were assigned responsibility for higher revenue-producing crops in some instances.[15] In each instance defendants were able to establish a sound reason for the action taken and that the white agent given the assignment was equally or better qualified than the black agent who did not get it. Plaintiffs were unable to show that the reasons assigned for the action

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[15] There was other evidence from which it appeared that the contrary was true. For instance, the commodities involved in the areas for which the plaintiff, P. E. Bazemore, had responsibility in Union County before he retired in 1980 were marketed for over ten million dollars which represented some thirty to forty per cent (defendants claims over fifty per cent) of the total dollar volume of all the crops and livestock sold in the county that year - far more than any other agent, black or white. Tr. pp. 576-579.

taken were pretextual, and the court is unable to find from a preponderance of the evidence that the Extension Service has discriminated against blacks in the area of job assignments.[16]

4. Promotions.

(i) County Level Agents.

At the county extension professional level there are three agent titles, assistant agent, which is the entry level, associate agent and full agent. The requirements for promotion from one rank,

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[16] If it is true, as the government contends, that blacks continued to be "under represented" in some major commodities, it may well be simply another reflection of the fact that agricultural agents continue to be in short supply. See defendants' proposed finding of fact No. 250 adopted by the court wherein it is said: "Blacks are particularly under represented among graduates in the field of agriculture. Successful recruitment and retention of blacks in agriculture is made more difficult by the fact that black agricultural graduates do not remain in the field.

to the next above have been in effect for twenty years and have been well publicized. These include service of time in rank before an agent can become eligible for promotion to the next higher rank, but agents who possess or earn a master's degree or a doctorate degree are given additional time credit which enables them to shorten the time required to be spent in a particular rank. A credit of one year is given for the master's degree and two years for the doctorate.

Upon satisfaction of the time requirements for promotion the agents is informed of his or her eligibility for promotion the procedures for which are uniform throughout the Extension Service. First, the district extension chairman is notified annually by the assistant director for county operations of the agents in each district who are eligible

for promotion consideration based on time in grade. The district chairman notifies the agent at the county level of his or her eligibility and provides the agent with a promotion form which requires the agent to give his or her performance, accomplishments, educational background and tenure. The agent then makes application for promotion by preparing and delivering the form to the county extension chairman who reviews the application and sends it along to the district chairman with his recommendations for or against the promotion.

Upon receipt of the application the district chairman confers with the district program leaders and obtains their observations and information pertaining to the performance of the agent with respect to his or her areas of subject matter responsibilities and extension educational

programs which they have been carrying out. On the basis of the information obtained from all sources including that obtained by him personally as a result of participation in the agent's annual performance review with the county chairman biannually and his personal observation of the agent's work from time to time the district extension chairman makes a recommendation as to promotion to the director's office at the state level where the application is reviewed by the director, associate director and assistant director for county operations who either approve or disapprove the promotion.

The promotion procedures employed by the Extension Service are set forth in more detail in defendants' proposed findings of fact Nos. 160-170 inclusive which the court adopts as its own and incorporates herein by reference.

Notwithstanding it has offered no evidence of non-compliance by the Extension Service with its promotion procedures the government contends that black agents at the county level have not received title promotions as rapidly as whites, and to prove the charge it has cited the cases of four black agents who applied for and did not immediately receive promotions. A review of al the evidence surrounding the failure of these four individuals go gain promotions initially has failed to convince the court that such failures were attributable to racial discrimination.

Jonnie Jones, a named plaintiff and a black, an admittedly competent agent, testified at the trial. He came across as an abrasive, argumentative and belligerent witness, but the court can only speculate as to whether these personality traits played any part in the denial of his

initial request for a promotion to the position of full agent. What does appear is that the request was reviewed by Dr. Paul Dew, the district chairman at the time, and all others required by the promotion procedure to be involved, and the decision was that Jones did not satisfy the established requirements for promotion at that time. There is not the slightest evidence that race had anything at all to do with the decision. Thereafter Jones accepted a position in Lenoir County where he obtained promotion to the position of full agent.

Haywood Harrell, a named plaintiff and a black, testified at the trial, and he was also an abrasive and belligerent witness. He identified several areas of dissatisfaction with the Extension Service, but its failure to promote him was not one of them. In fact he did not

testify that he ever applied for a promotion, and if he did not, this alone would eliminate any claim on his behalf based on a failure to promote him. It further appears, however, that Harrell was a very poor student when he was in school at A & T, his grades consisting mostly of "D's", and that although he was engaged primarily in 4-H work and was well aware of Extension Service policy that required 4-H Clubs to be open to all races, he has continued to organize all black clubs nor did he ever bother to instruct the volunteer leaders of the clubs that they were to be open to all races. There was no evidence that his failure to gain a promotion was in any way attributable to race, and on the contrary there is the unmistakable inference that he simply was not qualified for promotion.

Wanda Wilkins, a black but not a named plaintiff, testified at the trial that after she had been an assistant agent with the Extension Service for three years she applied for promotion to the position of associate agent but was turned down for the stated reasons that she had not performed satisfactorily in her 4-H programs and was "too concerned about getting married and going to graduate school." The government has compared her case with that of a white women with about the same tenure who was also engaged to be married and who was recommended for promotion at that time. The relative qualifications of the two agents were not shown by the evidence. Not satisfied with her rejection, Wilkins appealed to the associate director of the Extension Service who convened a review panel consisting of the district chairman, the

county chairman and the two district program leaders to inquire into the matter and report back to him. They also recommended that the promotion be denied because of "low participation and a weak program in 4-H," but they agreed to work with Ms. Wilkins "to improve the productivity of her program." She accepted this finding, her performance did improve and she was thereafter promoted.

Margaret Woods, a black non-plaintiff, was called as a witness by the named plaintiffs to show that the Extension Service had authority to transfer its agents between counties. By examination of this witness the government sought to show that she had been wrongfully denied a promotion. While an assistant agent in Gates County in 1977 Ms. Woods filed an EEOC charge which resulted in a hearing before a panel convened by the defendant.

The matter was settled and she was transferred to Randolph County where she applied for a promotion to the position of associate agent in 1980. This was denied, and in 1981 she transferred to Warren County where she again requested a promotion. She was then told by the district chairman that if she made satisfactory progress he would recommend her promotion on December 1, 1981. A meeting between the district chairman and Ms. Woods scheduled for November, 1981, did not take place, but on the basis of reports from his associates on the good progress Ms. Woods had made following her transfer to Warren County the district chairman did recommend her promotion and it was granted effective January 1, 1982.

The procedures including the performance evaluation system utilized in connection with promotions by the Exten-

sion Service of county level professionals are valid, proper and non-discriminatory, and they have been employed in a non-discriminatory manner.

(ii) County Extension Chairmen

The top administrative position in the Extension Service at the county level is that of county extension chairman. In addition to administrative and leadership responsibilities the chairman normally carries a subject matter program workload depending on the particular needs of the county. While the position is routinely filled from the ranks of county level professionals, it is one that has to be applied for and it is not considered by the Extension Service to be in the promotional line within the county. Rather, it is open to all qualified applicants from any county or state. A

major portion of the battle here has been waged around the claims of the named plaintiffs and the government that the Extension Service discriminates against blacks in filling these positions.

Beginning in 1972, the year the Title VII amendments bringing state agencies into its cover became effective, the Extension Service began publishing announcements of vacancies in the positions of county chairmen which announcements contain the name of the county in which a vacancy exists, the subject areas of responsibility which the county chairman must carry in addition to his or her administrative duties and the educational and experience qualifications required. All applicants must have at least a bachelor's degree, and a master's degree is desirable but not mandatory. Six years (formerly seven) of service with the

Extension Service or equivalent experience is required, at least two years of which must have been in the service of the North Carolina Extension Service. A master's degree will count for one year of experience and a doctorate two years.

All applicants who meet these qualifications are interviewed.[17] The most important factors considered in the interview process are subject matter ex-pertise required in the county, demonstrated leadership in present and previous positions, demonstrated administrative and management capabilities, educational background, advanced training, human relations and communications skills. Interview are

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[17] These minimum requirements have not been rigidly adhered to in every single instance, but where there has been a variance defendants have shown a valid reason for recommending the applicant in question for appointment as county chairman.

conducted separately by the district chairman, the assistant director for county operations, the associate director and the director of the Extension Service. The group then meets and discusses the strengths and weaknesses of all applicants and comes to a consensus as to whom they will recommend to the board of county commissioners of the county where the vacancy exists.

Occasionally more than one applicant will be presented to the board of county commissioners for interview and selection. It will be recalled that in the memorandum of understanding between the Extension Service and the boards of county commissioners all appointments are worked out jointly between the Extension Service and the commissioners and no official action can be taken unilaterally by either party with respect to filling a vacancy.

Accordingly, county commissioners have on occasion rejected an applicant recommended by the Extension Service, and some of these have been black. In more instances, however, white applicants have been rejected.

Since the institution of statewide announcements of vacancies in 1972 there have been seventy-seven county extension chairmanship position vacancies in the state. No blacks applied for fifty-nine of these vacancies, but eighteen individual blacks did apply for the remaining eighteen vacancies. Of the eighteen vacancies for which blacks applied five were selected as county chairman. Although highly recommended by the Extension Service another black, I. W. Murfree, was rejected by the Board of Commissioners of Granville County.

Thirty-seven individual whites applied for the eighteen vacancies for which the eighteen individual blacks also applied, and thirteen of the thirty-seven white applicants were selected as county extension chairmen.

It thus appears that of the thirty-seven individual white applicants thirty-five per cent were selected and that of the eighteen black applicants twenty-eight per cent were selected. A comparison of the white selection percentage with the black selection percentage shows that the black selection rate was eighty per cent of the white selection rate. This is exactly the rate established in the Uniform Guidelines on Employee Selection Procedures as a rule of thumb for deter-

mining whether employer policies or practice have an adverse impact on employment opportunities.[18]

Moreover, had the black applicant, Mr. Murfree, been accepted by then Commissioners of Granville County the number of successful black applicants would have been six out of eighteen, and the percentage of those applying would have been raised to thirty-three and one-third per cent. At the same time the number of successful white applicants would have been reduced by one of the

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[18] Section 4D, 43 Fed. Reg. 38,297 (1978), provides:

> "A selection rate for any race *** which is less than four-fifths (4/5) (or eighty per cent) of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by federal enforcement agencies as evidence of adverse impact.

percentage of successful white applicants would have dropped to thirty-two per cent.[19]

On the basis of the foregoing evidence the court is unable to find that the plaintiffs have established a prima facie case of discrimination in the selection of county chairmen. The result would be

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[19] Despite the suggestion in cases such as Brown v. Gaston County Dyeing Machine Company, 457 F.2d 1377, 1384 (4th Cir. 1972), and more recently given currency in EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981)(rehearing en banc denied by equally divided court, ___ F.2d ___, May 18, 1982), that the use of small samples such as those involved here may somehow be justified in order to compensate for the difficulty encountered by plaintiffs in proving discriminatory motive in these cases, these figures probably serve only to point up the inherent unreliability of such evidence as proof of inferences favorable to either side. Other courts have rejected such evidence as "meaningless." Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974). See also EEOC v. United Virginia Bank, 615 F.2d 147, 153 (4th Cir. 1980); Allen v. Prince George's County, 538 F. Supp. 833 (D. Md. 1982).

otherwise if only the government's statistics were considered at face value. The government contends that it has offered evidence tending to show that if black agents had been appointed to county chairman positions at a rate proportional to their 1964 representation in defendants' county professional work force, they would have received thirty-one county chairman appointments from 1962 through November, 1972; that only one black chairman was actually appointed during this period; and that the disparity in the rate of promotions was 5.98 standard deviations. Government's Proposed Finding No. 95. The government further contends that it has offered evidence tending to show that from 1962 until May, 1981, five blacks and 227 whites were appointed to county chairman positions; that from 1974 to 1981 the average

representation of blacks among full agents was 22.4 per cent; that if black agents had been appointed to county chairman positions at a rate proportional to their representation as full agents, they would have received fifty-two county chairman appointments from 1962 until May, 1981; and that the disparity in the rate of promotions was 7.40 standard deviations. Government's Proposed Finding No. 127 and GX 124.1. Standing alone these statistics would certainly create a prima facie case of discrimination.

> There can be no doubt that standard deviations of this magnitude demonstrated that the low proportions of women in the technical and managerial categories were not the result of chance. But it was a quantum leap, under circumstances of this case, to jump from that proposition to the conclusion that such high standard deviations proved - or even had any tendency to prove - that defen-dants had committed a legally cognizable wrong. Far from being conclusive against

> defendants, plaintiff's statistical evidence and the EEOC reports on which it was based were totally wanting in probative value.

Ste. Marie v. Eastern Railroad Association, 650 F.2d 395, 400 (2d Cir. 1981).

Such is the case here where closer examination reveals that the government's statistics are fatally flawed.

> If the prima facie case is established by the EEOC's statistical evidence, the employer may nevertheless rebut it, dispelling the inference of a general policy of discrimination, by "demonstrating that the Government's proof is either inaccurate or insignificant." Teamsters, 431 U.S. at 360. ... One way that static work force statistics revealing gross disparities can be shown nevertheless to be "insignificant" is by showing that the disparities are mainly attributable to pre-Act rather than to post-Act employment actions. This may be done in two basic ways: by focusing on the static work force statistics and purging them of all pre-Act employment actions so that only post-Act actions remain for assessment; or, more commonly,

> by focusing on post-Act employment decisions, and showing either than considered alone, they affirmatively reveal nondiscrimination in the post-Act period or that they are insufficient in number to support an ultimate conclusion of a post-Act discriminatory pattern or practice. Hazelwood, 433 U.S. at 309, 313. ...

EEOC v. American National Bank, 652 F.2d 1176, 1188 (4th Cir. 1981).

The position of county chairman was created in 1962-63 before the merger of the two branches of the Extension Service, and the first one hundred appointees were white. Not until 1971 was the first black county chairman appointed. At the time of trial a total of 232 county chairmen had been appointed, only five of whom were black. As previously shown, however, there have been only seventy-seven vacancies since 1972 when Title VII was made applicable to public employers, and

blacks have applied for only eighteen of these.[20] The appointment rate for blacks during this period has been within the applicable EEOC Guidelines, and the court must reject the government's attempt to have pre-Title employment decisions considered in this instance. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 (1977) ; United Airlines v. Evans, 431 U.S. 553 (1977);

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[20] The possibility of liability for pre-Title VII discrimination under 42 U.S.C. §§ 1981 and 1983 has been considered, but any such claims arising prior to November 18, 1968 would be barred by the statute of limitations, and in any event proof of the intentional discrimination necessary to sustain an action under these statutes (even if the case is considered as one of disparate impact as the government would have the court do) has not been established. General Building contractors Association v. Pennslyvania, ___ U.S. ___, 50 U.S.L.W. 4975 (June 29, 1982). The named plaintiffs have conceded in their brief that proof of discriminatory purpose is required to prove a prima facie case of discrimination under 42 U.S.C. §§ 1981 and 1983. Plaintiffs' Brief filed February 8, 1982, at p. 5.

Ste. Marie v. Eastern Railroad Association, 650 F.2d 395, 401 (2d Cir. 1981); EEOC v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980); EEOC v.Local 14, 553 F.2d 251 (2d Cir. 1977).

> Thus, in order to be valid, a statiscal analysis such as the one presented here must exclude those persons hired prior to [March 24, 1972, the effective date of Title VII for public employers]. To include pre-Act hires in the statiscal analysis in this case would improperly weight the evidence and would tend to show present discrimination by an employer if it had discriminated prior to the effective date of the Act but had not discriminated after the Act took effect.

EEOC v. United Virginia Bank, supra, at 150.

Plaintiffs' statistics are flawed in a further respect in that they include the assumption that every black full agent at the county level was qualified to fill the position of county chairman. There was an

utter lack of any proof to substantiate such a claim, and the persistent efforts of defendants through discovery and all the way through the trial to require plaintiffs to identify the qualified labor pool from which this position should be filled met with no success.[21] While it is true that most vacancies have been filled

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[21] Evidence of the named plaintiffs that they were qualified for the position of county chairman consisted principally of their own self-serving and conclusory testimony. Courts uniformly reject such testimony as insufficient to establish qualifications. Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980).

> Smith, of course, testified that he had versatility, and that his competence as an analyst was not confined to the field of logistics. Smith's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant.

Id. at 1067. See also Lovelace v. Sherwin-Williams Company, ___ F.2d ___ (No. 80-179, 4th Cir., June 15, 1982), Slip Opinion at 31.

from within the ranks of the county professionals, it is equally true that the position of county chairman requires special administrative and leadership skills not shared generally by all such employees, and

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

Hazelwood School District v. United States, 433 U.S. 299, 308 n.13 (1977). See also United States v. Commonwealth of Virginia, 620 F.2d 1018, 1025 (4th Cir. 1980), and EEOC v. Radiator Specialty Company, 610 F.2d 178, 185 (4th Cir. 1979).

The plaintiffs have complained that defendants employ subjective criteria in selecting applicants to be recommended for

appointments as county chairman, and this is true to some extent. However, the Extension Service after considerable study and effort developed and put into effect in 1972 a "Performance Review Guide" for the purpose of evaluating the performance of its employees.[22] The performance of each agent in the Extension Service is evaluated annually. Both the agent and the chairman participate in this process, and the district chairman participates in it bi-annually. The persons involved in the process attempt to reach a consensus on the evaluation of the agent's performance,

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[22] The development of the Extension Service's performance evaluation system is traced in defendants' proposed findings of fact Nos. 104-144 inclusive to which plaintiffs have interposed no serious objections, and as background information the court adopts these findings as its own. Significantly, the plaintiffs produced no evidence to show that the Extension Service's performance evaluation system is invalid or improperly validated.

and when the Performance Review Guide is completed and signed it is filed with the district chairman and thereafter used in matters affecting the agent's performance when such matters as promotions and merit salary raises are under consideration.

The fact that several persons including the agent himself participate in the evaluation and promotion processes minimizes the possibility that bias or prejudice on the part of any one individual will affect decision.[23] Valentino v. United States Postal Service, 511 F. Supp. 197, 933 (D.D.C. 1981), aff'd, 674 F.2d 56

[23] At least four of the highest ranking officials in the Extension Service participate in the county chairman selection process. These officials, each of whom holds a doctorate degree from a leading university, testified at the trial. They came across as fair-minded, exceptionally capable professionals and the court credits their testimony in which they disavowed any racial bias or prejudice in the performance of their duties, particularly with respect to promotions.

(D.C. Cir. 1982). Moreover, in the white collar employment context courts have tended in recent years to become more tolerant of subjectivity in employment decisions. Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981); Presseisen v. Swarthmore College, 442 F. Supp. 593 (E.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978). When subjective criteria are used fairly and with procedural safeguards they have been approved by the courts and EEOC. Thompson v. McDonnell Douglas Corporation, 416 F. Supp. 972, 982 (E.D. Mo. 1976). The use of subjective criteria is certainly not unlawful per se, for hiring and promotion decisions in supervisory and managerial positions cannot realistically be made using objective standards alone. Rogers v. International Paper Company, 510 F.2d 1340, 1345 (8th Cir. 1975), vacated on

other grounds, 432 U.S. 809 (1975). At these levels the test of legality of white collar employment practices is not whether they are subjective, as inevitably they are, but whether they are applied fairly. See Waintroob, The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level, 21 Wm. & Mary L. Rev. 45, 48-62 (1979). The plaintiffs next assert what has come to be known as "futility claims" - claims of blacks who contend they did not apply for the position of county chairman because they felt that blacks were being discriminated against and that it would be futile to do so. The court has again reviewed the testimony of the five black agents relied upon to establish such claims, James Wright, Slater Lloyd, William Wright, Leroy James, named plaintiffs, and Helen Payne, a non-plaintiff. As a result the

court remains of the opinion formed at the time of trial that the reasons given by these witnesses for not applying for county chairmanships were not credible.[24]

James Wright, a black agricultural extension agent in Hertford County, testified that when the position of county chairman opened in the late 1960's in that county he did not apply for it because he thought it was futile to do so. When another vacancy in the county chairman's position came open in Hertford County in 1979 Wright was recommended for the position by the Extension Service and did

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[24] A non-applicant's burden of proving that he would have applied for a position except for the perceived employer's discriminatory practices is not an easy one. Resolution of such claims not only requires proof that the claimant would have applied but for discrimination but also that he was qualified and yet would have been discriminatorily rejected had he applied. Teamsters, supra, 431 U.S. at 368.

in fact apply for it. He was rejected by the Board of Commissioners of Hertford County in favor of a white person. Since the trial that person has resigned, James Wright has re-applied for the position, has been appointed and is now serving as county chairman of Hertford County.[25]

Slater Lloyd simply testified that he did not apply for the position of county chairman in Granville County in 1971 because he "didn't think they would appoint a Negro as county chairman at that time."

William Wright testified that he did not apply for the position of county chairman in Nash County about 1971 because

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[25] This information has been furnished the court pursuant to the court's directive at the close of the trial that it be kept informed of vacancies in county chairmanships and actions taken to fill them. Wright, incidentally, was selected over two other applicants for the position, one white and one black.

he was not aware that there was a vacancy until it had already been filled. Since Wright was working everyday in the same office with the county chairman who resigned, this evidence was simply incredible.

Leroy James testified that he did not apply for a county chairmanship in 1965 because "I had the feeling I wasn't going to get the job, so I didn't apply."

Q. Why did you have that feeling?

A. Well I felt that the people from the state level - I was not going to be able to reach them. And I felt maybe on the county level I hadn't reached the clientele from that point of view. So that is the reason I didn't apply.

Q. Was there any contact or conversation that you had had with the administration that gave you that feeling?

A. Not really.

Tr. Vol. 11, pp. 2510-11. James was recommended by the Extension Service for the county chairmanship of Johnston County in 1976, but was not selected. In 1978 he was recommended for the county chairmanship of his home county of Pitt and was appointed and is now serving in that position.[26]

Helen Payne testified that she did not apply for the position of county chairman in Caswell County in 1974 because "I felt like it was a waste of time and to avoid embarrassment .... I didn't know of any other woman - black home agent - in the state that was a county chairman." In 1974 Payne already had in more than thirty years of service with the Extension Service and was eligible for retirement.

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[26] The individual claims of the four named plaintiffs who gave futility claim testimony will be treated more fully in a later memorandum.

She did in fact retire a few years thereafter. The does does not credit any inference which may arise from the testimony of this witness that she would have applied but for discrimination, but in any event there was no evidence from which the court could find that she was qualified for the position and that she would have been discriminatorily rejected had she applied.

It thus appears that of the five witnesses on whose testimony the plaintiffs rely to establish "futility claims" only one, Helen Payne, testified concerning a vacancy which occurred after Title VII became applicable to public employers in 1972. It was the court's impression that this one witness was clearly not qualified for the position of county chairman; that it never crossed her mind to apply for the position in 1974; and that if she had

applied, she would have been rejected but not for any discriminatory reason. Of the other four witnesses two of them did apply for vacancies after the Extension Service to the county commissioners of the two counties in which their applications were made and eventually each of them was appointed and is now service as a county chairman.

Further proof of the lack of merit in the "futility claims" of the blacks who did not apply for county chairmanships lies in the fact that many blacks did apply for these positions after 1972, and when they did they were appointed in approximately the same ratio as were the white applicants for the same positions. The court rejects all futility-based claims of discrimination.

In sum, the court finds that the statistical evidence fails to establish a prima facie case of racial discrimination by the Extension Service in filling county chairmanship vacancies, but in any event the defendants have effectively rebutted plaintiffs' case by showing the inaccuracy and insignificance of plaintiffs' proof. This has been done by showing that apparent disparities in plaintiffs' static work force statistics are mainly attributable to pre-Act rather than post-Act employment actions; that they are based on the erroneous assumption that the qualified labor pool consists of every black professional at the county agent level in the state; that all black professionals are available for assignment to any county in the state; that defendants' post-Act decisions which to some extent are based on subjective criteria reveal non-dis-

crimination in the post-Act period; and that defendants have adopted proper and valid procedures for promotions to the position of county chairman which plaintiffs have not questioned. These procedures having been fairly and uniformly followed without bias or prejudice, the claims of plaintiffs based on alleged racial discrimination by the Extension Service in the selection of county chairman must fail.

(iii) State Level Positions.

The positions in the Extension Service other than those at the county level are known as state level positions. These include the director, associate and assistant director, specialists, program leaders and district extension chairman. The duties of these various offices have been more fully described in the background section of this memorandum.

Traditionally most, but not all, of these positions have been held by whites.

State level positions, with few exceptions, require a minimum of a master's degree, and the majority of them require a PhD either in agriculture or home economics.[27] Since all state level positions are also faculty appointments within the School of Agriculture and Life Science at NCSU these positions are subject to the selection and promotion criteria utilized for recruitment and promotion of faculty at the university level. Selection and promotion of state level personnel in the Extension Service therefore differs from the selection and promotion procedures utilized for county

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[27] The minimum degree requirements for the various state level positions are set forth in defendants' propoosed findings of fact Nos. 219-225 inclusive which the court adopts as its own and incorporates by reference.

level positions.

Where, as here, the need for special qualifications for state level positions is manifest it is incumbent upon a plaintiff alleging discrimination to produce "specially qualified market statistics" in order to show disparities. Hazelwood School District v. United States, 433 U.S. 299, 308 (1976); EEOC v. Radiator Specialty Company, 610 F.2d 178, 185 (4th Cir. 1979). But here again the plaintiffs have failed to show the number of qualified and available blacks in the labor pool or relevant labor market from which defendants could fill these state level positions. Defendants, on the other hand, have shown that the labor pool from which defendants recruit is sharply limited for that

> ... blacks are greatly underrepresented among the graduates with master's or PhD's in agriculture and home economics. For the academic years 1975-76, 1976-77 and 1977-78 blacks represented from only 1.4% to 2.4% of the total recipients of master's degrees and from 1.2% to 2.1% of the PhD's in agriculture and natural resources in the United States. A total of only 43 blacks received PhD's in agriculture in the United States during these three years. None were awarded in North Carolina. In the field of home economics, for the above three years, blacks received from 4.7% to 5.1% of the total number of master's degrees awarded in the U.S. and from 8.6% to 11.9% of the PhD's. However, only a total of 20 PhD's were awarded in home economics to blacks during this entire three-year period, with only one awarded in North Carolina. In North Carolina the percentage of blacks receiving master's degrees in home economics ranged from 8.6% to 11.9% of the total master's degrees awarded in this field for the period 1975-78.

Defendants' Proposed Finding of Fact. No. 216.

In addition to their failure to show the number of qualified and available blacks in the relevant labor market the

plaintiffs have failed to produce any evidence as to how many qualified blacks have applied but have not been accepted for employment by the Extension Service in a state level position.

The procedures employed by the university and the Extension Service to fill state level positions are designed to obtain the best qualified persons and at the same time to comply with all employment discrimination laws. The employment and selection system is governed by the university's affirmative action officer, Dr. Lawrence M. Clark, who is black. A search committee is then formed which makes a nationwide search for interested and qualified persons. Position announcements are sent to all 1862 and 1890 land grant institutions and also to nationally-based journals in the subject area in the particular vacancy. After interviews with

interested applicants have been conducted decision is made to offer the position to the candidate thought to be best qualified, but before he or she is offered employment, the approval of the university affirmative action officer is obtained.[28]

The admittedly valid procedures employed by defendants in filling state level positions having been fairly and uniformly followed, in the absence of any evidence tending to show bias or prejudice in their implementation, it follows that plaintiffs have failed to establish a prima facie case of discrimination in filling these positions.

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[28] These procedures are set forth in more detail in defendants' proposed findings of fact Nos. 229-237 inclusive to which plaintiffs have not objected, and the court adopts them as its own and incorporates them herein by reference.

III. Salaries.

In the language of Title VII the plaintiffs have alleged that the Extension Service had denied blacks "the same compensation, terms, conditions and privileges of employment as provided to whites," but the plaintiffs' evidence has concentrated only on alleged discrepancies in salaries between blacks and whites. The establishment of this claim continues to be a primary goal of both the named plaintiffs and the government. With respect to "terms," other than salaries, "conditions" and "privileges" of employment, suffice it to say that such meager evidence was was offered either failed to establish a prima facie case or was conclusively rebutted by defendants,[29] and

[29] For example, in an apparent effort to show discrimination in providing office facilities, Geraldine Ray, a black named plaintiff, testified that she felt "stigmatized" because she was provided

the court will therefore limit its discussion to the matter of the alleged

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with an old desk and that when new carpeting was installed it did not cover all the offices but stopped "right at her door." Tr. p. 2325. Defendants' witness, Worth Gurkin, explained that his request to the county commissioners to include in his budget enough money to carpet all the offices was cut in half and therefore only one-half the offices were carpeted that year; that the office of another black agent was carpeted but his own office and Ray's were not; and that the desk complained of was a good solid wood desk which, although it could have used some sanding and a coat of varnish, is still in use ten years later. Tr. p. 6332-39. The claim was patently frivolous.

The original complaint alleged that blacks were denied the same quality and quantity of "in service training" as whites. There was some evidence concerning in service training but it tended to show that opportunities afforded blacks in this respect equaled or exceeded those afforded whites. Significantly, plaintiffs have not submitted proposed findings of fact on this and other subjects related to "conditions and privileges" of employment and with respect to the defendants' proposed findings (207-210 inclusive) plaintiffs have simply responed under the "red, blue, yellow" system of marking opposing parties' proposed findings used in this case that the findings are not denied but are irrelevant.

discriminatory pay practices of the defendants.

The Extension Service has established a minimum entry level salary for all new professional employees at the county level who hold a bachelor's degree and have no prior experience. A salary differential is paid those having a master's degree at the time of employment. On occasion it has been necessary to pay more than the entry level salary in order to employ persons to fill positions requiring special skills. Exceptions are also made in the case of new employees whose prior experience in teaching or business has better equipped them to assume responsibilities of their positions more quickly.

Because of inflation starting salaries have increased rapidly in recent years, and this in turn has made it necessary to adjust the salaries of those

already employed in order to maintain a proper relationship between the salaries of beginners an those who have acquired some tenure. In order to make such adjustments is is sometimes necessary to use funds intended for normal merit salary increases.

As previously stated, funds for the payment of salaries derive from three sources, the counties, the state and the federal government. The financial ability of counties to support the local extension program and the salaries of its agents varies considerably between the lower income counties and higher income counties and between the counties in the western, Piedmont and eastern sections of the state. The percentage of total salaries of county extension employees that is contributed by the counties varies from

county to county, ranging from a high of 57% in Forsyth County to 18% in Camden County.

From time to time a given county may grant across-the-board pay increases to its employees which may also be in the form of a specified percentage of the county portion of the salary or a designated amount for each employee. Some counties may not grant such increases at the same time. There is no fixed procedure between the counties for the granting of pay increases among counties.

Each year about ten of the counties also make available to the Extension Service funds to provide merit salary increases. In some cases these increases are designated by the county commissioners as to the amount and which agents shall receive them. In other cases the county extension chairman will make these merit

increase decisions based on job performance of the agent for the previous twelve months.[30] The evaluation of the agent's performance forms the basis for determination of his eligibility for a merit salary increase and the size of that increase, if any.

Funds furnished by the state to pay salary increases are usually provided on a percentage or flat sum basis across the board to all University employees which include employees of the Extension Service. There is no evidence that such salary increases have not been granted by the Extension Service in accordance with the state's authorization and without

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[30] The job performance evaluation system used by the Extension Service is described in detail in defendants' proposed findings of fact Nos. 104-144 inclusive previously adopted by the Court. See Footnote 22.

discrimination. The same is true with respect to across-the-board increases granted by the counties.

In some years the state appropriates funds to be used to provide employees with "merit" salary increases. These funds, usually somewhat less than the cost-of-living funds, are intended to be used to reward those employees with superior job performance records as documented in the performance evaluation system previously referred to. In addition to the Performance Review Guide this system includes "quartile" rankings.[31] The appraisal of the

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[31] Under the quartile system each agent is placed in one of four quartile groups by the district extension chairman, and the determination of an agent's quartile ranking for each particular year is based upon his performance during the preceding performance evaluation period. In determining an agent's quartile rank for a particular year his performance is measured against his goals and objectives for the year as set forth in the individual plan of work and how well the agent performs the duties and functions called

employee's performance by the county chairman, the district and state program leaders and specialists and the district extension chairman are also taken into account.

Based on the employee's job performance as thus evaluated the district exstension chairman then makes an actual merit salary recommendation for each individual agent and county chairman within his or her district, to be paid from funds made available from the merit funds allocated by the assistant director for county operations to the district. Each district extension chairman is advised of the total amount of merit money available for his or her district, but

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forin the job description. Agents do not compete against other agents' performance to achieve a quartile ranking but compete only against themselves and their performance is measured on an individual basis. Agents are not ranked within a quartile.

before the allocation of merit money begins the district extension chairman must first make salary adjustments to reflect any increases by the Extension Service during the previous performance period in the entry level salary for positions of assistant, associate and full agents.[32]

These procedures for fixing salaries and awarding merit increases are not in serious dispute, but plaintiffs seriously contend that through the years they have been discriminatorily implemented with the

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[32] For instance, in 1981 the increase in starting salaries required an adjustment in present employees' salaries in the amount of approximately $70,000. After this adjustment is made, the district extension chairman then makes a lump sum allocation of dollars to each agent within the first three quartiles. An agent in the fourth quartile ordinarily will not receive a merit increase. However such agent whose salary was below the entry level salary for his or her title will have received the adjustment made prior to the merit salary allocation process.

result that blacks have been paid substantially lesser salaries than have whites and that such discrimination has continued to this day. To prove this charge plaintiffs have resorted to statistical evidence and evidence of specific instances of alleged discrimination involving individuals. For the reasons to follow the court finds that the plaintiffs have failed to establish this claim by a preponderance of the evidence.

(i) The Statistical Evidence

Plaintiffs offered the testimony of Dr. Charles Mann, an admitted expert statistician with extensive experience in employment discrimination litigation. Using the now familar multiple regression technique,[33] Dr. Mann conducted a multiple

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[33] See Baldus and Cole, Statistical Proof of Discrimination, pp. 239, et seq. (1980); Article, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harvard L. R. 389

regression analysis for each of the years 1974, 1975 and 1981 based on data furnished the United States Department of Agriculture by the Extension Service with the following results.

For the year 1974 he included 540 county level professionals. Controlling for tenure[34] and education he found the regression coefficient for race, that is, the excess of the salary of a white over the salary of a black, to be $1,112.00,

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(1975); and Fisher, "Multiple Regression in Legal Proceedings," 80 Columbia L. R. 702 (1980).

[34] In Dr. Mann's 1974 and 1975 regression analyses tenure was defined as the difference between the date of the personnel file and the date when the individual's current appointment with the Extension Service began without a break in service. His 1981 regression analyses used the defendants' definition of tenure, that is, the difference between the date of the personnel file and the date when the individual's current appointment with the Extension Service began without a break in service, plus years of prior federal service, and added one year.

and he testified that this was statistically significant. When sex and program areas were added as independent variables the race effect exceeded $800 and remained statistically significant. When job title was added to tenure and education the race effect dropped to between $257 and $337 depending on the other variables included, but the results again remained statistically significant.

For the year 1975 Dr. Mann included 569 county level professionals. Controlling for tenure and education the regression coefficient for race was $1,207, a statistically significant effect. When sex and program area were added as independent variables the race effect exceeded $880 and remained statistically significant. When job title was added to tenure and

education the race effect dropped to $312 to $395 depending on the other variable included.

For the year 1981 he included 560 county level professionals. Controlling for tenure and education the coefficient for race was $970 which was statistically significant. When sex and program area were added as independent variables the race effect exceeded $560 and remained statistically significant.

In running his regressions Dr. Mann, of course, included only those variables which he was requested by his employers, the plaintiffs, to include. Consequently he included all county chairmen in all of his regressions and omitted job title as a variable in those regressions on which plaintiffs principally rely. Other variables which defendants contend impair the validity of Dr. Mann's regression will be

discussed later.[35] In answer to a question by the court he conceded that the inclusion of other variables could have affected the results. Tr. pp. 435-436.

(ii) Comparison of Individuals

It is undisputed that prior to the merger of the white and black branches of the Extension Service in 1965 salaries of professionals in the black branch on the average were less than those of their counterparts in the white branch. Following the merger this disparity was recognized and steps were taken to begin its elimination prior to the amendments to Title VII which brought the Extension Service under its coverage in 1972. Nevertheless the government has offered

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[35] Dr. Mann is a highly qualified statistician, but he disclaimed any expertise concerning factors that go into fixing salaries in the Extension Service. Plaintiffs called no expert to supply the information which Mann was unable to give.

evidence tending to show that as of January, 1973, the salaries of numerous black agents throughout the system were less than those of white agents in the same counties who were in comparable or lower positions and who had comparable or less tenure (GX 102). The government has also cited defendants' own exhibit (DX 48) as showing some salary disparities between blacks and whites as late as October, 1974.

The Extension Service's problem of bringing black and white salaries into line has been similar to that which faced most business enterprises with a prior history of racial discrimination following the passage of the Civil RightsAct of 1964. Just as it had been found in the area of education that there is no such thing as instant integration, it was soon found in the field of business and

industry that there is no such thing as instant quality in employment. Without risking serious disruption of a business by prohivitively costly budgetary alterations and a possible practice of wholesale reverse discrimination it was soon recognized (though not always by the courts) that the adjustments mandated by the law simply could not be made overnight. The dilemma of the Extension Service was further compounded by the fact that its operating funds came from three separate political entities each of which retains a voice in all major employment decisions.

To recognize these problems, however, is not to excuse non-compliance with the law. The court has therefore carefully reviewed plaintiffs' evidence showing individual salary comparisons and as a result has concluded that while on its

face and evidence unquestionably establishes salary disparities, when viewed in the light of defendants' explanatory evidence it fails to prove discrimination.

The exhibits referred to have not been found persuasive for several reasons. To begin with the January, 1973 figures shown on GX 102 are only selected examples taken from across the state almost ten years ago, and in most instances the differences in pay between the black agents and white agents is very small. There is nothing to show the areas of responsibility of the agents compared and more importantly, there is no way to make a comparison between the job performances of the agents. The information contained in DX 48 is similarly inconclusive. The lack of probative force of such evidence

becomes more readily apparent when the cases of three specific individuals cited by plaintiffs are considered.

Martha B. Thomas, a named plaintiff black, was employed as a home economist by the Extension Service in 1970. She had come to North Carolina from Mississippi where she had gained some experience in the Mississippi Extension Service. Although there is nothing to indicate that she was not employed at the then applicable entry level salary, she complains that the salary of a white home economics agent was $500 more than hers at that time. In rebuttal defendants showed that the white agent was already an associate agent at the time Thomas was first getting started as an assistant agent. Another white home economics agent shown by plaintiffs to have had a higher salary than Thomas was shown by defendants to

have been a full agent with an extensive backlog of experience both as an extension agent and as a home economics teacher in the public schools. Finally, Thomas received a reprimand for her consistent failure after warnings to make certain required reports on time. She was told that the reprimand would go into her personnel record; that it would have an adverse effect on her future salary possibilities; and that she had a right to appeal the decision. She did not do so.

Johnny Jones, a black, was employed by the Extension Service in Greene County in February, 1971, with several areas of responsibility including 4-H. Because of a $100 mix-up" in his salary, which was corrected at mid-year, he joined as a plaintiff in this action in November of that year. In July, 1972, he was transferred to Craven County, promoted to

associate agent and given a salary raise. In early 1973 he transferred to Durham county where he worked exclusively in "urban 4-H" work under a black county chairman. The extension Service portion of his pay in Durham County came from "1890 funds."[36] In 1978 for reasons not quite clear unless it was to return to the area of his birthplace and longtime residence, Jones applied for and was given a transfer to Leonoir county to work as an agricultural agent.[37] Jones testified that

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[36] Funds made available by Congress especially for the benefit of balcks to be administered through the 1890 land grant colleges, in this case A & T University at Greensboro, North Carolina.

[37] After entering the employment of the Extension Service Jones pursued a course of graduate studies at NCSU which ultimately led to a master's degree in adult and community education in 1977. Had he remained in urban 4-H work this additional education would doubtless had been of considerable value to him and the Extension Service. Its value in this work as an agricultural agent would appear to be minimal, and in any event it does not

he had "buried the hatchet as far as salary was concerned," but that it "resurfaced" when, following a recess in the trial during which he was shown by a government attorney that a white agent in Lenoir county, one Jimmy Pollock, was being paid about $2,000 per year more than he, Jones testified "I just feel like I may be underpaid."

With respect to Jones the evidence of the defendants showed that while he was a very competent agent, particularly in his field of 4-H work, Agent Pollock with whom he was sought to be compared, was an exceptionally well qualified livestock agent with a rare expertise in swine; that Pollock had been lured away from his employment with the Extension Service by

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support a claim of disparate salary treatment when his salary is compared to that of a competent, experienced agricultural agent without a master's degree.

a higher salary with the North Carolina department of Agriculture where he continued to add to his knowledge and expertise over a period of about five years; that because of Lenoir County's position of importance both in the state and nation in livestock production it was necessary to have an agent of Pollock's competence to carry on the livestock program in that county; and that in order to get Pollock back it was necessary for the Extension Service to match the salary which he was paid by the Department of Agriculture. From all the evidence there arises absolutely no inference that race had anything at all to do with the differential between the salaries of Jones and Pollock.

Wanda Wilkins, a non-plaintiff black woman who joined the Extension Service in Greene County in 1974, testified for the

plaintiffs that she would make $400 less in 1982 than a white woman agent with comparable tenure; that she had had a master's degree since 1980 while the white woman has only a bachelor's degree; and that she has concluded that her failure to get promotions and raises has been because of her race.

The defendants on the other hand showed that over the five-year period during which Wilkins was studying for her master's degree she was commuting to Raleigh from Greene County - roughly a one an one-half to two-hour drive each way; that she was given a total of eighty-five days off in which to pursue her graduate studies but nevertheless her extension programs suffered during the time she was commuting to graduate school and still trying to keep up with her work; that her performance record, particularly in the

field of 4-H which constituted eighty per cent of her work, was far short of what was expected of her; and that her salary simply reflected her poor productivity.[38] It is perhaps significant that she has never sought to intervene in this action.

In summary, the statistical evidence of plaintiffs standing alone and without further explanation probably suffices to make a prima facie showing of discrimination in salaries; the corroboration to be found in the comparison of salaries of individuals in the exhibits is at best

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[38] It appeared that in 1980 out of a potential of over 4,000 children Wilkins only had 124 involved in 4-H, down from 213 in 1973, the year before she went to work, 360 in 1977 and 487 in 1978; that she had nine clubs organized whereas the average for the 4-H agents in the state is thirty clubs and 400 members; that her average day participation in district activity was five whereas the counties average twelve; and that participation by her children in the 4-H Congress never exceeded three while the average for other agents was ten.

meager; and the evidence in the three individual cases proposed by plaintiffs as representative has been completely rebutted.

Turning then to defendants' evidence on the question of salaries we begin by considering the alleged defects in the plaintiffs' statistical evidence. It will be remembered that Dr. Mann's regression analysis, which forms the centerpiece of plaintiffs' salary discrimination claims, in addition to race contained only two independent variables, tenure and education. Defendants contend, and the court is constrained to agree, that the omission of other equally if not more important variables so flaws the results of the regression that it cannot be accepted as preponderant proof of plaintiffs' claims.

> Statistics are ... competent in prov- ing employment discrimination. We caution only that statistics are not irrefutable;

> they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances.

Teamsters, 431 U.S. 324 at 339-40.

It has been said that multiple regression models never conclusively prove anything. They merely describe statistical relationships. While a negligible coefficient for race may warrant the inference that race is not an important factor to the employer in fixing salaries, the converse is not necessarily true for legitimate qualification variables may have been omitted from the model. Baldus-Cole, supra, at p. 243. Here the defendants list numerous variables omitted from plaintiffs' regression which sharply limit if not indeed destroy its probative force.

More specifically defendants point to the failure of plaintiffs' regression to include

(1) Performance of agents measured against the agents' plan of work;

(2) The variations in salaries created by across the board state raises with the different percentage of state contributions in each county;

(3) The across the board increases in agent salaries by some counties and not in others;

(4) The merit raises provided by the state;

(5) The merit raises provided for by the counties in which Extension Service personnel have no input;

(6) The merit raises provided by the counties with limited or full participation in the merit recommendation by Extension Service personnel;

(7) The range in merit salary increases provided by the counties (0 - 12% in 1981);

(8) Prior and relevant experience; and

(9) Variations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience.

It will be observed that all these variables are difficult if not impossible to measure and quantify. Thus neither side undertook to incorporate them in their regressions. Yet it is indisputable that following entry level the single most important factor in determining salaries for the Extension Service professional staff is job performance. As previously stated, each employee is evaluated annually on the basis of his or her job performance measured against a standard of acceptable performance. The agent participates in this evaluation process and the results are reflected in salary changes such as merit raises made thereafter. But even so, other factors over

which neither the Extension Service nor the agent has any control are constantly influencing salary changes. Examples of such factors are the differences in the state contributions to salaries in each county, the differences in across-the-board increases in agent salaries and merit raises in some counties and not in others and market forces.[39] Even among

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[39] The influence of market forces on salary has been illustrated previously in the case of Agent Pollock. At the time he was rehired by the Extension Service livestock agents were in short supply and it was necessary to pay more to hire and retain him that it would have been to hire and retain other more plentiful agency such as home economists and 4-G agents.

> "We had a vacancy in a dairy agent position back within the last twelve months. That position stayed vacant for almost a year for the simple reason that we could not find a dairy-trained agent at the price we were able to pay. We have a standard starting salary, and we simply could not go into the market and hire a dairy agent for that price. ... Over the years, certain areas seem to be

agents with the same program responsibilities the salarydemands may differ substantially from county to county. For instance, an agent with tobacco responsibility in a large tobacco-growing county will command a larger salary than an agent with the same responsibility in a county where tobacco is not the major crop.

A principal criticism of plaintiffs' statistics is based on the fact that the raw data on which they were based includes the salaries of county chairmen. Although the selection process, as we have seen, is not discriminatory, a relatively small

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in short supply and therefore the demand is great and the starting salaries are high. A few years we were in almost the same situation with horticultural agents. But not, there is a fairly plentiful supply of horticultural graduates available. Therefore we generally can find what we are looking for in that area. Blalock, Tr. pp. 3457-8.

number of blacks have applied for these positions and the result is that ninety-four of the one hundred county chairman positions are held by whites. Because these top county positions go to the highest qualified agents who possess administrative and leadership qualifications in addition to their professional expertise, they naturally command the highest salaries at the county level - an average of at least $4,000 per year more than the average salaries of all other agents. It is immediately apparent, therefore, that when the salaries of these ninety-four white agents are included with those of the few hundred other agents in the plaintiffs' regression, the results are going to be distorted.[40] Plaintiffs,

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[40] The size of the distortion depends upon whose salary data figures are accepted as accurate. The parties are at odds as to the correctness of the salary data used by Dr. Mann in his regression. Since computer

while admitting through Dr. Mann that it is proper to include job titles (here assistant agent, associate agent and full agent) in a salary regression if it does not "obscure race effect," (Tr. pp. 369-70), contend that the evidence on discrimination in promotions in this case is "overwhelming" and therefore job titles were properly excluded in Dr. Mann's

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tapes were not available for the years 1974 and 1975 Dr. Mann used tapes for later years together with other personnel records furnished him by the United States Department of Agriculture to work backward and create tapes for those years. While the regression based on this reconstruction showed 569 salaries, the defendants were able to find only 318 salaries recorded in the column Dr.Mann identified as having been the source of the salary data included in his regression. If the defendants' figures are accepted as correct, it thus appears that almost one-third of the salaries included in the Mann regression were those of county chairmen. Since the burden was on the plaintiffs to establish the accuracy of the data to which their statistics were based, the court is constrained to accept defendants' figures as being more accurate in this instance.

regression. For the reasons previously stated the court has rejected this contention, and it now holds that job titles were improperly omitted from plaintiffs' regression and the salaries of county chairmen were improperly included therein. Agarwal v. Arthur G. McKee & Company, 664 F.2d 8903 (9th Cir. 1981), affirming Agarwal v. McKee, 19 FEP Cases 503 (N.D. Cal. 1977); Wilkins v. University of Houston, 656 F.2d 388 (5th Cir. 1981), rehearing denied, 662 F.2d 1156 (5th Cir. 1981); Presseisen v. Swarthmore College, 42 F. Supp. 593 (E.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978); Fisher, supra, 80 Columbia L. R. 702, 721 n.32 (1980).

Dr. Francis Giesbrecht, a qualified expert in the field of statistics, prepared several multiple regression analyses for defendants. Using the same

statistical methodology employed by Dr. Mann and most of the same data, when he controlled for the same independent variables as did Dr. Mann the results were not significantly different. When the county chairmen were omitted the coefficient for race dropped sharply, and when quartile rankings were added to tenure, education and job title the race effect was reduced to $142 in 1981. The use of these variables accounted for seventy-seven per cent of the total salary variations between blacks and whites. Dr. Geisbrecht testified that "it is a subjective decision as to whether that explains enough of it or not" and that he would expect that the addition of other factors such as variations in county salaries and work in different crops would lead to some changes. Tr. p. 6210.

After considering the great mass of statistical evidence produced by both sides about the only firm conclusions the court was able to reach were that when the only independent variables used in a salary regression were tenure and education the coefficient for race was significant; that individual salaries are affected by a large number of factors; that when other valid factors were introduced the race effect diminished but did not disappear; and that there are several unmeasured factors, notably job performance, the absence of which seriously flaws the results.

> Multiple regression analysis is a relatively sophisticated means of determining the effects that any number of different factors have on a particular variable; while it may be the best, if not the only, means of proving classwide discrimination with respect to compensation in a case such as this - where a number of factors operate simultaneously to influence salary - it is subject to misuse and thus must be employed with

> great care. Ideally, when a multiple regression analysis is used, it will be the subject of expert testimony and knowledgeable cross examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis. In the instant case, the statistical evidence associated witn the multiple regression analysis is inconclusive, raising more questions than it answers.

Wilkins v. University of Houston, 654 F.2d 388, 402-3 (5th Cir. 1981), a case strongly relied on by defendants. On petition to rehear the case and suggestions for rehearing en banc the plaintiffs were able to show that defendant's expert statistician had given testimony (apparently through inadvertence) to the effect that his regression analysis model without a sex variable had produced a table showing that men and women were treated equally with regard to pay when in fact he

was using another regression analysis which did contain a sex variable. While the point was held to cast doubt and render incorrect statements in the court's original opinion which relied on this erroneous testimony, in denying the petition the court said:

> Nonetheless, we still adhere to our original conclusion and affirm the district court on the class plaintiffs' faculty compensation claim.
>
> The thrust of our original opinion on faculty compensation remains unchanged; plaintiffs have failed to demonstrate the validity of the multiple regression model as a whole. ... Since multiple regression analysis is subject to misuse, courts cannot be expected to accept at a face value conclusions derived from such a model absent expert testimony concerning the validity of the model itself. ... [W]hen the class plaintiffs purported to use the university's statistics for their own purposes, they did not fulfill their burden of showing that the multiple regression analysis model employed was valid. Without guidance, this court cannot be expected to

> resolve in the class plaintiffs' favor fundamental questions relating to the model itself. (Footnotes omitted.)

Wilkins v. University of Houston, 662 F.2d 1156, 1157 (5th Cir. 1981).

In an attempt to explain and distinguish Wilkins the plaintiffs filed a supplemental brief in which they point to the court's emphasis on "the need for expert testimony to enable the trial court to assess the validity of the regression model and the significance of the results." Plaintiffs assert that their expert, Dr. Mann, testified that the results of his regression were "meaningful and statistically significant," and that using the same methodology defendants' expert obtained the same results. The court accepts this testimony at face value so far as it goes, but the difficulty with plaintiffs' argument is that the statisti-

cians disclaimed any expertise in the area of the factors that go into determining Extension Service salaries, and the court was left with only the testimony of Extension Service professionals to supply this information (see Footnote 35, supra). At the same time both statisticians conceded that if additional variables (not tainted by race) were included in the regressions, the results would be substantially altered. Implicit in the testimony of Dr. Mann as to why he included county chairmen but not job titles in his regression was that he felt (or perhaps had been instructed) that these variables were tainted by race. Certainly it is plaintiffs' position that they were so tainted, but as stated before the court has rejected this contention.[41]

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[41] It is true, as plaintiffs assert, that defendants' expert, Dr. Giesbrecht, did not question Dr. Mann's methodology and

And so, like the court in Wilkins, this court is left without expert testimony concerning the validity of the regression model itself, and without such guidance the court cannot be expected to resolve fundamental questions relating to the model in plaintiffs' favor.

The defendants offered other evidence tending to negate the inferences raised by the statistical evidence. In 1976 when the salaries of all agents except county chairmen were compared the average salary of white agents exceeded that of black agents by $130, but the average tenure of the white agents exceeded that of the black agents by 1.5 years. In that same

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results, but Dr. Giesbrecht's own evidence went considerably further. Dr.Mann came back to court to hear Dr. Giesbrecht testify, and the court considered it significant that he was not recalled to rebut any of Dr. Giesbrecht's testimony. The inference is that he did not disagree with it.

year the salaries of black agents with a bachelor's degree exceeded that of white agents with the same degree by $121 although the average tenure of the white agents exceeded that of the black agents by 1.6 years. In 1976 blacks with master's degrees averaged $409 less in salary than whites with master's degrees and 1.5 years less tenure. The figures for 1979, 1980 and 1981 showed comparable results with the blacks with bachelor's degrees and blacks with master's degrees exceeding the average salaries of their white counterparts in five instances out of six. The fact that the average salaries of all white agents when compared with all black agents is slightly higher was accounted for by the fact that a far greater percentage of white agents than

black agents have master's degrees. The figures are contained in DX 201-205 inclusive.

Finally, the defendants offered a series of graphs sometimes referred to as "scattergrams" showing the relationship of salary to tenure of black and white agents at the various county job levels for the years covered by the salary regressions. DX 256, et seq.; Giesbrecht, Tr. pp. 6180, et seq. Using the data from defendants' salary regression when plotted on these graphs the salaries of blacks and whites were displayed in a completely random distribution.[42]

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[42] Each side also introduced exhibits showing that certain individuals made more or less than certain other similarly situated individuals. Because, as has been previously shown, job performance and unmeasurable factors go into practically all salary decisions the court is unable to assign any significant probative force to these exhibits.

Having thoroughly considered all of the evidence bearing on the salary issue and the contentions of the parties based thereon, the court has concluded that it if be assumed that plaintiffs made out a prima facie case on this issue, it has only been by virtue of the plaintiffs' statistical evidence based on the multiple regressions of Dr. Mann; that because of their failure to include many of the vital factors necessary to be considered in fixing salaries the probative force of these statistics has been so substantially undermined that they cannot sustain a finding of purposeful discrimination in salaries under any of the statutes on which the action is based;[43] that the

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[43] Faulty statistics do not create a prima facie case. Allen v. Prince George's County, 538 F. Supp. 833, 849-55 (D. Md. 1982) (in an action against a public employer our same Dr. Charles Mann's regression analysis was rejected becuse it did not exclude pre-1972 hires). Even

defendants have not only "articulated" plausible reasons for the seeming salary disparities, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), but have satisfied the court of the validity of their explanations; and that the plaintiffs have not shown that defendants' reasons were pretextual.[44] It follows that plaintiffs have failed to establish by a preponderance of the evidence that the Extension Service has discriminated against black employees in the matter of salaries.

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where the statistical compilation result in "lopsided ratios," they are not conclusive proof of discriminatory employment practices. EEOC v. United Virginia Bank/Seaboard National, 555 F.2d 406 n.6 (4th Cir. 1977).

44 "Statistical evidence of the existence of de facto discrimination is not determinative of the pretext issue." Agarwal v. McKee & Company, 644 F.2d 802, 806 (9th Cir. 1981).

IV. Segregating Blacks In Work Assignment

Prior to the merger of the two branches of the Extension Service in 1965 black agents worked only with black clientele and white agents worked only with whites. There is no substantial evidence that this practice continued after the merger. In those instances in which black agents continued to spend a disproportionate amount of their time working with blacks there is no evidence that this has not been a matter of choice with the agent instead of any requirement on the part of the Extension Service. Rather, the evidence showed that the assignment of agents was largely the result of numerous factors such as employee preferences, job qualifications and conditions affecting job availability. Such evidence will not support a finding

that blacks have been intentionally segregated in their work assignments for racial reasons.[45] Hilton v. Wyman Gordon Company, 624 F.2d 379 (1st Cir. 1980).

V. Failing to Establish Valid Tests.

The allegation is that the Extension Service has failed and refused "to establish valid qualifications, tests, selection standards and procedures which are sufficiently objective to prevent continuing discrimination in hiring and promotion." It is at once apparent that the allegation assumes a fact which the

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[45] If this has ever been a problem since the merger, in view of the rapid decline in the black farmer population it could not remain one long. According to the United States Bureau of the Census there are now only 57,271 farms currently operated by blacks in the United States, down from 926,000 in 1920. The current rate of decline of black-operated farms is two and one-half times the rate of decline of white-operated farms. Report, U.S. Commission on Civil Rights, The Decline of Black Farming in America, February, 1982.

court has failed to find from a preponderance of the evidence, that is, that the defendants have discriminated in their hiring and promotion procedures. These procedures have been previously described in detail in the sections on hiring (Page 20, et seq .) and promotion (pages 23, et seq.) and will not be repeated here.

Since all professional positions in the Extension Service are also faculty positions at NCSU and all require college degrees, it is difficult to understand just what additional tests plaintiffs contend the Extension Service should administer in connection with its hiring practices.[46]

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[46] Plaintiffs produced no evidence of any person claiming to have been wrongfully denied employment by the Extension Service on account of race, and no such person joined as a plaintiff in the action.

The use of the performance review guide in connection with promotions has been referred to previously (see Footnote 22). Chief architect of this performance evaluation system was Dr. Edgar J. Boone, an assistant director of the Extension Service and head of the Department of Adult and Community College Education at NCSU. He had had over twenty-five years' experience in Extension Service work, the last nineteen of which have been in North Carolina. He has been engaged principally in program analysis and personnel development. His primary responsibility with the Extension Service is in the staff development program. He is a nationally recognized authority, and the court was impressed with his expertise in this field.

Following extensive work during the 1960's in developing a programming guide and job descriptions for Extension Service agents work was begun under Dr. Boone in 1970 to develop a method of appraising the performance of Extension Service workers. Separate biracial committees were formed for this purpose, and over a period of two years there were developed two performance review guides, one for county agents (DX 237A) and one for county chairmen (DX 237B). They are used as counseling and diagnostic tools, and while their primary purposes are to enhance job satisfaction and professional competence, to assist agents in recognizing areas where improvement is needed and to assist the Extension Service in more effectively accomplishing its mission, they re also one of the many things considered in fixing salaries and awarding promotions. In the opinion of

Dr. Boone the performance review guide does not discriminate against blacks, has never been so used and does not have an adverse impact on blacks.[47] A grievance procedure is available to any employee not satisfied with the evaluation on his or her work by the performance review guide, but to date no agent, black or white, has resorted to the use of this grievance procedure.

Prior to 1979 USDA at a cost of approximately one million dollars contracted with the American Institute for Research to develop a national performance appraisal system for the Extension Service. A comparison of the results ofe

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[47] Dr. Boone conceded that no studies had been conducted to make this determination. Significantly, although charged with the burden of establishing discrimination, the plaintiffs with all the United States Department of Agriculture (USDA) resources at their command, have apparently conducted no such study either.

this study with that already developed in North Carolina by the Extension Service shows that they both undertake to measure essentially the same elements of job performance and that the only material differences between the two systems are that under the North Carolina system the agent participates in self-evaluation while under the national system he does not; and under the national system weights are assigned to the various job duties while under the North Carolina system weights are not assigned. The national system is comparatively new and it has only been adopted in full in one state. The North Carolina system, on the other hand, was first adopted in 1972, and it has been under periodic review and revision over a period of ten years. It has been studied by representatives of

forty-one states, and portions if not all of it have been adopted in a great many states.

The conclusion is that the performance review guides in use in North Carolina are valid devices for measuring the performance of Extension Service agents; that they are not racially discriminatory; and that plaintiffs have fallen far short of establishing by a preponderance of the evidence that the Extension Service had failed to establish valid qualifications, tests, selection standards and procedures for use in its hiring and promotion practices.

VI. Failing to Correct Present Effects of Past Discrimination.

The allegation is that defendants have failed and refused "to take appropriate action to correct the present effects of past racially discriminatory policies

and practices." Here again the allegation involves the assumption that there has been discrimination in the past the effects of which continue, a thesis staunchly denied by defendants. Assuming the correctness of the assertion, however, nowhere in the statute law is there found any specific requirement that an employer must take affirmative steps to eradicate possible continuing effects of prior discriminatory practices. Plaintiffs have cited no pertinent employment discrimination cases in support of their position, but they have cited and relied on several school desegregation cases such as Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), for the proposition that there is a continuing duty to dismantle unconstitutional school systems which rule by analogy should be applied here.[48]

[48] Insofar as plaintiffs' claims are grounded

These cases are considered distinguishable, however, for in all such cases a clear and present violation of the law is involved. By contrast, in the employment context the fact that a completed

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on Title VII Hazelwood, supra, affords some guidance.

> "Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formally maintained an all-white work force by purposefully excluding Negroes. Id., 433 U.S. at 309.

This court has found that at least since 1972 the defendants have made all their employment decisions in a wholly nondiscriminatory manner. Even where a Title VII violation has been found declaratory and injunctive relief are not required where the evidence shows that the forbidden employment practice has been abandoned and the employer has indicated the intention to comply with the law in the future. Williams v. Yazoo Valley-Minter City Oil Mill, Inc., 469 F.Supp. 37, 52 (N.D. Miss. 1978).

prior discriminatory act has an impact which continues into the present is not actionable under the employment discrimination laws. United States v. Evans, 431 U.S. 553, 558 (197); Farris v. Board of Education, 576 F.2d 765 (8th Cir. 1978); Wilson v. Allied Chemical Corporation, 456 F. Supp. 249 (E.D. Va. 1978); Annotation: 49 A.L.R. Fed. 693.

Notwithstanding the lack of any statutory or case law requirement that it take affirmative action looking to the elimination of any residual discrimination of pre-Act origin the Extension Service has taken highly commendable steps to conform its employment practices to the law. It would unnecessarily prolong this opinion to list the actions taken, but they are summarized in detail in defendants' proposed findings of fact Nos.

256-267 inclusive which the court adopts as its own and incorporates herein by reference.

The result has been that the number of black professionals employed by the Extension Service increased by 14 per cent between 1970 and 1979, the latest date for which figures were available, and during this period the salaries of black professionals increased by 121.8 per cent while salaries of whites were increasing only 114.1 per cent. Nationally the percentage of non-white professional Extension Service employees is five per cent. In North Carolina it is seventeen per cent.[49]

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[49] Only South Carolina with twenty per cent ranked higher. By contrast the USDA, which started out as a co-defendant with the Extension Service in this action but wound up on the opposite side of the versus when the Department of Justice entered the picture, had only 7.1 per cent black employees in all pay grades in 1979 and only 3.1 per cent in grade GS-12 and above. The Extension Service is hampered in its efforts to recruit even more blacks

The Extension Service currently employs blacks at a rate approximately three times the proportion they represent in the total labor pool from which it recruits.

A violation by the defendant of any duty, statutory or otherwise, "to take appropriate action to correct the present effects of past racially discriminatory policies and practices" has not been established.

VII. Failure to Provide Equal Services to Minorities.

The allegation that the defendants have failed to provide minorities with services equal to those provided white persons need not detain us, for there was no evidence at all to support this allegation and counsel for the government

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by the fact that the USDA actively competes with the Extension Service for the highest qualified blacks and is able to pay higher salaries.

finally conceded that the defendants are not discriminating in the delivery of their services to all races. Tr. pp. 3285-6672.

VIII. Failure to Provide Services On A Non-Racially Segregated Basis.

The allegation is that defendants have failed "to provide services to 4-H clubs, extension homemaker clubs, farmers and other persons on a non-racially segregated basis." There was no evidence that the Extension Service provides services to "farmers and other persons" on a racially segregated basis, but it is not disputed that there are many 4-H clubs and extension homemaker clubs throughout the system whose members are all of one race. The services provided by the Extension Service to such clubs of necessity are provided on a racially segregated

basis.[50] The issue thus raised is subsumed in the question of whether the existence of such racially segregated clubs violates federal law, and this is the subject of the next section of this memorandum.

IX. Maintenance of Racially Segregated 4-H and Extension Homemaker Clubs.

The allegation is that defendants have failed to maintain non-racially segregated 4-H clubs and extension homemaker clubs. As stated, there are many such clubs in North Carolina, and there are many clubs to which members of both races belong. The question is whether or not the action of the Extension Service in recognizing and furnishing

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[50] There is no evidence to show that the quality of such services is any different for the clubs of one race than for the other. None of the named plaintiffs representing 4-H and extension homemaker clubs gave testimony at the trial.

services to the segregated clubs violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which proscribes action forbidden by the Fifth and Fourteenth Amendments. Regents of University of California v. Bakke, 438 U.S. 265(1978); Taylor v. Cohen, 405 F.2d 277, 281 (4th Cir. 1978). The Act states simply that

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Plaintiffs contend that the members of one-race clubs are subjected to discrimination in violation of this statute and the Constitution when they receive services from the federally-funded Extension Service; that the Extension Service should take affirmative steps to

require these clubs to merge with clubs in the same community that are of another race; and that should these efforts fail the Extension Service should withdraw its services from any club which failed to integrate. Defendants, on the other hand, contend that membership in these clubs is entirely voluntary; that the is no evidence that any one of either race has ever been excluded from membership in any club, or participation in, or denied benefits of, any program or activity for the Extension Service;[51] and that Extension Service produced no witness who testified

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[51] There was evidence of one isolated instance in which a black child was told by a voluntary worker from the community that he would not be welcome as a member in a white 4-H club. The worker was promptly removed by the Extension Service and the child was admitted.

that he or she had ever been discriminated against in connection with the delivery of services by the Extension Services.[52]

The evidence adduced at the trial fully supports each of defendants' contentions. No witness appeared to testify that membership in any 4-H or extension homemaker club was anything but voluntary; or that he or she had been denied membership in any such club on the basis of race; or that he or she had ever been subjected to discrimination with respect to any services offered by the Extension Service.[53] The question remains,

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[52] Defendants made a further contention that to withdraw services from these segregated clubs would be to deny such services on the grounds of race - itself a violation of Title VI. In view of the court's finding that the furnishing of services to the clubs does not violate Title VI it is not necessary to decide this interesting question.

[53] The evidence shows, and plaintiffs do not question, that for all phases of club activity above the community club level,

therefore, as to whether the law requires that these clubs be integrated. The court has concluded that it does not.

Since the evidence has failed to show exclusion from participation in or denial of benefits of or discrimination in the delivery of services, no violation of Section 601 of Title VI, 42 U.S..C. § 2000d, has been established. We next look to the regulations adopted by the USDA pursuant to the directive of Section 602 of the Act, 42 U.S.C. § 2000d-1. These are found in 7 C.F.R. § 15.1, et seq.

Following a general prohibition of discrimination in language tracking that of Title VI, Section 15.3(b) of the regulations lists some specific discrimi-

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all extension staff and volunteer club leaders, all county-wide, district and state meetings and training sessions are fully integrated. In working with the clubs all agents work across racial lines.

natory actions which are prohibited. One of these is that a recipient of federal funding may not on the grounds of race, color or national origin "[s]ubject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program."

Section 15.3(b)(6) provides:

> (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
>
> (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

Section 15.3(d) lists programs and activities together with illustrations, by way of example only, of types of activities covered by the regulations. With respect to Extension Service programs the following are listed as prohibited activities:

> (i) Discrimination in the use in any program or activity of the Cooperative Extension, demonstrations, information, and publications offered by or through the Cooperative Extension Service;
>
> (ii) Discriminationin the use in any program or activity of the Cooperative Extension Service of any facility, including offices, training facilities, lecture halls, or other structures or improvements; or
>
> (iii) Discrimination training activities, admission to or participation in fairs, competitions, field days, and encampments, conducted or sponsored by, or in which the Cooperative Extension Service participates.

It will be observed that in order to establish a violation of any of these regulations it is first necessary to establish that the action complained of was taken "on the ground of race, color, or national origin." There has been no such showing in this case. No individual has been "subjected" to segregation or separate treatment by the defendants. If any individual has become a member of a club composed only of members of his or her own race, it has been an entirely voluntary act without any force or coercion on the part of the Extension Service. Indeed, the Extension Service requires that each club formed certify that membership in the club is open to all races. There is no evidence of discrimination in making available the instructions, demonstrations, information and publication of the Extension Service ; or

in the use of any structure or training facility; or in training activities, competitions or encampments sponsored by the Extension Service.[54] Finally, the plaintiffs insist that certain "guidelines" issued by the USDA in connection with its regulations require the Extension Service to use "all reasonable efforts" to integrate the 4-H and extension homemaker clubs.[55] Defendants contend that their efforts to integrate the clubs have been

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[54] Prior to the merger the North Carolina Extension Service, like those in all other southern states, maintained separate summer camps for black and white 4-H clubs. Although many states in the south closed their 4-H camps in 1964 and 1965, following the merger the defendant here elected to continue camp operation and to work toward a fully integrated camping program at all 4-H camps. By 1972 all of the camps in the state had been fully integrated.

[55] Because of the pendency of this suit North Carolina was exempted from the requirement of these guidelines that an affirmative action plan be developed. Tr. p. 6520.

reasonable, but in any event the guidelines do not have the force of law. Although requested by the court from time to time to produce some authority to the contrary, plaintiffs were never able to do so. While administrative interpretations of statutes and regulations are entitled to deference, they are not controlling.

> The actions of [HEW], as its guidelines, are entitled to respectful consideration, for, in large measure or entirely, they are a reflection of earlier judicial opinions. We reach our conclusion independently, for, while administrative interregation may lend a persuasive gloss to a statute, the definition of constitutional standards contolling the actions of states and their subdivisions is peculiarly a judicial function.

Bowman v. County School Board, 382 F.2d 326, 328 (4th Cir. 1976).[56]

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[56] This case also approved "freedom of choice" in school desegregation cases provided the initial assignments are not involuntary and dictated by racial criteria, a situation not present here.

Two other cases have considered the question of dismantling segregated 4-H and extension homemaker clubs by extension services, Wade v. Mississippi Agricultural Extension Service, 372 F. Supp. 1126 (N.D. Miss. 1974), aff'd in part, reversed in part and vacated and remanded in part, 528 F.2d 508 (5th Cir. 1976); and Strain v. Philpott, 331 F.Supp. 836 (M.D. Ala. 1971), and at variance with the rulings in these two cases. Closer examination reveals this not to be true.

In Wade defendants were required

In a companion case decided the same day, Green v .County School Board of Kent County, Virginia, 328 F.2d 338 (4th Cir. 1967), which was appealed, the Supreme Court, while declining to hold freedom of choice plans unconstitutional per se, held that when the use of such plan has proved totally ineffective in dismantling a state-imposed dual school system and other means promise speedier conversion to a unitary, non-racial school system, freedom of choice is not acceptable. Green v. School Board of New Kent County, 391 U.S. 430, 439-40 (1968).

> to take reasonable steps to eliminate discriminatory practices of local clubs by assuring that all private groups sponsored by MCES or affiliated with its program are racially nondiscriminatory in their membership policies and methods of operation. these steps include the discontinuance in MCES' sponsoring youth activities at racially segregated, private schools established to avoid public school desegregation, since such sponsorship is a state aid prohibited by the Constitution.

Id. p. 145. the reported opinion does not contain the order entered on this ruling, but the pertinent portion of the order is set forth in the opinion of the Fifth Circuit. 528 F.2d at 519 n.9. From this and the above quoted excerpt it is clear that the district court found actual discrimination, which this court has not; that the club meetings in Mississippi were being held in racially segregated private schools established to avoid public school desegregation which is not true in North Carolina; and that the remedy ordered was

that the defendant require the various clubs to implement affirmative action plans to eliminate all discrimination in their membership and program practices. It was required that the plans specifically contain the assurance that the clubs do not discriminate in their membership or activities on account of race and that these things be publicized. The evidence in the case at bar indicates that the defendants here would already be in substantial compliance with such an order. Even so the Fifth Circuit observed:

> The approach of the court to commandeer the 4H clubs is tenuous at best. No member of any white segregated 4H club was a party to the suit before the court. It is beyond dispute that for a personal judgment to be binding the court must have personal jurisdiction over the person against whom it is sought to be enforced. To enforce a judgment against a person not before the court clearly violates due process of law. Pennoyer v. Neff, 95 U.S. 714 (1878).

528 F.2d at 519. The same is true in this case.

In Strain v. Philpott, which involved the Alabama Extension Service, the plaintiffs (and the United States as plaintiff intervenor) as in this case alleged wholesale discrimination in every phase of the defendant's activities including the maintenance of racially segregated 4-H and home demonstration clubs. The court found that the "purported" merger of the black and white dual Extension Service systems in 1965 "thoroughly and effectively perpetuated and to a substantial degree aggravated the racial discrimination which existed previously." 331 F. Supp. at 842. There is no discussion of the clubs in the court's opinion, since the decree entered thereon is not published, we have no basis upon

which to compare the ruling of this court with that of the district court in Alabama.

Finally, if it be assumed that the action of the Extension Service in continuing to tolerate voluntary, racially segregated 4-H and extension homemaker clubs is somehow discriminatory, there remains the question of whether it is incumbent upon the plaintiffs to show that the discrimination is intentional. The authorities do not speak with one voice on this subject, but in this court's view the better reasoned cases hold that a showing of discriminatory intent or purpose is necessary in order to establish a violation of Title VI. Castaneda v. Pickard, 6488 F.2d 989 (5th Cir. 1981); Guardians Association of New York city v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980), cert. granted, 50 U.S.L.W. 3527;

Otero v. Mesa County Valley School District, 470 F. Supp. 326 (D. Col. 1979), aff'd on other grounds, 628 F.2d 1271 (10th Cir. 1980).

> Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.

50 U.S.L.W. at 4429-30.

> "Discriminatory purpose" intent as volition or intent as awareness of consequences. ... It implies that the decision-maker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administration of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Tested by these standards the evidence in this case falls far short of establishing discriminatory intent or purpose. Substantial evidence to the

contrary is to be found in the fact that the Extension Service has had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race; that it instructs its agents to encourage the formation of new clubs without regard to race; that it publishes its policies in the media; that all of its club work and functions above the local community level are being conducted on a fully integrated basis; that its 4-H camps are fully integrated and have been for over ten years; and that no person has been denied membership in any club on account of race. That the policies of the Extension Service have not operated to deprive blacks of club opportunities is evidenced by the fact that while the population of North Carolina is only twenty-two per cent

black, 4-H club membership has remained at approximately thirty-two per cent for the last ten years.

The simple truth is that in the matter of these one-race clubs the Extension Service has been faced with a dilemma which admits of no easy, readily available solution. On the one hand it has been under constant pressure from the government to eliminate racially segregated clubs or terminate services to them.[57] On

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[57] In a classic case or bureaucratic bludgeoning the director of the office of equal opportunity of the USDA in a letter drafted March 2, 1972 to Dr. John T. Caldwell, the Chancellor of NCSU, and a defendant in this case along with the USDA at that time, was told that the Extension Service was not in compliance with Title VI and the department's regulations, and he was given ten days in which to comply or have the case referred to the Department of Justice. Among other things required to be done, presumably within this ten-day period, were the following: devise new programs for minorities, provide services across racial lines, desegregate all clubs, give Negro agents first priority for consideration for all promotions to district and county chair-

the other hand there is the stark reality

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manships and the establishment of hiring quotas. Attachment A to Government's Motion to Dismiss filed January 3, 1975. In 1971 the Extension Service had submitted to USDA "a program for equal employment opportunity in the North Carolina Agricultural Extension Service": which the department had rejected because it did not conform in all respects to a "model"program promulgated by the department. Dr. Caldwell, himself a native of the deep south and one of the nation's foremost educators, in a letter dated October 29, 1971 to the department pointed out logical reasons why the "model" should not be adopted verbatim in this state and suggested compromise language that could be employed without changing the import and effect of the model. He concluded the letter thus: "Let me assure you again of our intent to conscientiously and vigorously implement an equal employment opportunity program within the North Carolina Agricultural Extension Service. The points we have raised in no way indicate a reluctance on our part to do what we feel is the intent of this law. We do feel that the modification we are suggesting still meet these requirements and will represent a program that we can earnestly strive to follow in every aspect and detail."

Three weeks thereafter this lawsuit was filed with the result that the good faith efforts of the Extension Service to resolve its differences with the Department of Agriculture were frustrated thus placing on this court the burden of doing

that in North Carolina as well as all other states integration of the races more frequently than not meets with strong resistance.[58]

The choice thus posed is whether it is better that the Extension Service continue to provide its much needed services to well over 100,000 North

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so more than ten years later.

[58] That whites are not alone in their desire to exercise the right of freedom of association is illustrated in this case by the action of the black extension agents in forming an organization known as "Friends of 1890." This followed the consolidation (forced by the Extension Service) of the two agents professional organizations, one black and one white, which had existed prior to the merger of the two branches of the Extension Service. Although membership in the organization is open to any friends or graduates of an 1890 land grant institution such as A & T, it has remained all black and no individual white has ever been asked to join. In addition to its social activities business meetings are held relating to the work of black extension agents. If needed the funds of the organization are used to support litigation of the type involved here. Tr. p. 795, et seq.

Carolina club members while striving to achieve full integration of the clubs or that it withdraw such services altogether as the government would have it do. The Extension Service has opted for the former, and in so doing this court does not perceive that it has violated the rights of anyone under any law.

SUMMARY OF PATTERN AND PRACTICE CLAIMS

The preceding nine sections of this memorandum list each of the pattern and practice claims alleged by the named plaintiffs and the government in their amended complaints, and specific reasons have been assigned as bases for the court's conclusion that none of them has been substantiated by a preponderance of the evidence.[59] In this section there will

[59] "[B]ecause it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or

be summarized some general considerations taken into account by the court in reaching its conclusions, some of which involve factual predicatesand legal principles not previously identified with specificity.[60]

'accidental' or sporadic discriminatory act. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the usual practice." Teamsters, 431 U.S. at 336.

60 Reference has been made to the "blue, red, yellow" system of marking the proposed findings of fact of opposing parties. Under this system each side was required to and did mark in blue pencil the proposed findings of the opposing party with which there was no disagreement; in red pencil the findings which were contested and objected to; and in yellow pencil the findings which were not contested but which were contended to be irrelevant. In addition to the specifically adopted findings previously listed the court now adopts as its own all proposed findings which were marked by the parties in blue and yellow.

The case has been hard fought by able counsel on all sides and it has not been an easy one to decide. At the outset the court was confronted with conflicting contentions as to whether it is a disparate impact or a disparate treatment case as those terms are defined in employment discrimination law. Disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Disparate treatment claims result when an employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Teamsters, supra, 431 U.S. 335-6. Disparate impact cases ordinarily involve the use of facially neutral devices such as employ-

ment tests, as in Griggs v. Duke Power Company, 401 U.S. 424 91971), which tests are not shown to be job-related or otherwise justified by business necessity and which result in the exclusion from employment benefits of a disproportionate number ofa favored group. The nearest thing in this case to such a device was the "quartiling" system discussed previously (see Footnote 31), but this is simply a measure of an agent's performance against his own annual plan of work and not against other agents. The system was not shown to have an adverse impact on blacks.

What we are left with, therefore, are the employment practices of the defendant Extension Service as they affect blacks in recruitment, hiring,promotion, assignments and salaries. The entire thrust of the plaintiffs' case has been that in these

practices defendant has treated blacks less favorably than whites on account of their race. The court has therefore concluded that the case should be analyzed under the disparate treatment test of McDonnell-Douglas v. Green , 411 U.S. 792 (1973), rather than the disparate impact test of Griggs.[61]

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[61] That the choice between the two tests is not always an easy one has been recognized by the Fourth Circuit in Wright v. National Achives & Records Service, 609 F.2d 702, 7120-13 (4th Cir. 1979), where the court seems to suggest inferentially in dictum (Footnote 10) that the choice may turn on the relative number of people affected by the alleged discriminatory practice. While the very essence of "pattern and practice" is a "standard operating procedure" which affects all the people in a favored group, it seems to this court that if the number test is going to be applied to determine whether a practice has a disparate impact rather than a disparate treatment effect, it is going to create more problems than it solves.

Having reached this conclusion, then, the ultimate issue is whether the Extension Service regularly and purposefully treats or has treated blacks less favorably than whites and whether this disparate treatment is racially motivated. EEOC v. American National Bank, 652 F.2d 1176, 1188 (4th Cir. 1981). A careful weighing assessment of the plaintiffs' statistical and non-statistical evidence led the court to conclude that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices, and the analysis proceeded on this assumption. While not conceding that plaintiffs had made a prima facie case, the defendant Extension Service assumed the burden of articulating plausible reasons for its actions, and its evidence, which the court found convincing, has been set forth

herein. When the plaintiffs failed to produce evidence to establish that defendant's reasons were pretextual plaintiffs' case failed. EEOC v. Korn Industries, Inc., 682 F.2d 256, 262 (4th Cir. 1981).

The big difficulty with plaintiffs' case and the statistical evidence offered in support of it is the assumption inherent therein that the professional white collar positions in the Extension Service are fungible and that there is a readily available labor pool of qualified blacks from which vacancies can be routinely filled. This is simply not the case.[62] Valentino v. United States Postal

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[62] Compare, for instance, a case tried in this Court, Sledge v. J.P. Stevens & Company, Inc., 585 F.2d 625 (4th Cir. 1978), where defendant's own evidence showed that the vast majority of textile workers it hired could walk in off the street and with minimal instruction go right to work.

Service, 511 F.Supp. 917 (D.C.D.C. 1981); Agarwal v. Arthur G. McKee & Company, 19 FEP Cases 503 (N.D. Cal. 1977). The fact is that blacks qualified for jobs in the Extension Service are in short supply.[63]

Moreover, the fact that a black professional is qualified does not necessarily mean that he is available. Form the North Carolina coast to the far reaches of the Appalachian Mountains is a distant of about 600 miles. In many of the eastern counties the population is about evenly divided between blacks and whites. Very few blacks live in the western counties.

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[63] Virtually every named plaintiff who gave testimony stated that subjective belief that they were qualified for a position and that it had been denied them on account of their race. "Basing recovery on that fact is an improper consideration. The question is whether or not the company did in fact discriminate, not whether or not the employee did in fact believe the company had discriminated." Lewis v. Tobacco Workers' International Union, 577 F.2d 1135, 1143 (4th Cir. 1978).

Traditionally, blacks have prefered to live in areas with substantial black populations. Fitzpatrick v. Board of Education City of Enid, 578 F.2d 858, 863 (10th Cir. 1978).[64]

There was discussion earlier of the fact that each of the one hundred counties in the state is a co-employer with the Extension Service and that each retains the veto power over all employment decisions at the county level. Only three of the counties were made parties to the

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[64] Black professionals are not always available to accept positions even in counties with substantial black populations. For example, in this case the plaintiff first named in the caption, P. E. Bazemore, declined to accept an appointment as county chairman in Montgomery County less than 100 miles from his home county of Union. Another named plaintiff, Carrie Thompson, declined to accept the county chairmanship of Washington County where she resides, and apparently no other black cared to apply for this position which had remained vacant for several months at the conclusion of the trial of this case.

suit. The chances that each of the one hundred counties would take the same approach to employment matters are probably remote, but in any event there was no evidence from which the court could determine that they would do so. The extent to which possibly discriminatory employment decisions may have been made solely as a result of positions taken by the various counties will never be known, but to assume that responsibility for any such decisions should be laid only at the door of the Extension Service would be to ignore another tragic legacy of our history - the realities of racial attitudes and their effects which have afflicted not only North Carolina but the entire nation for more than a century.[65]

[65] This is not to say that in the formation of its own decisions the Extension Service has any right to defer to local prejudices. Such defense was specifically rejected in Wade v. Mississippi Coopera-

> Certain vestiges of discrimination - although clearly not the most pressing problems facing black citizens today - are a haunting reminder of an all too recent period of our nation's history.

Justice Stevens (dissenting) in Rogers v. Lodge, ___ U.S. ___, 50 U.S.L.W. 5041, 5046 n.1 (1982).

Another regrettable legacy in our nation's history has been the substandard education afforded black citizens. The defendant here has for understandable

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tive Extension Service, 372 F. Supp. 1126 (N.D. Miss. 1974), but in that case Judge Keady apparently assumed that the defendant Extension Service had sole responsibility for all employment decisions, a position urged by plaintiffs on this court but rejected in the light of the contractual agreement between the Extension Service and the counties. And Judge Keady was writing without the benefit of General Building Contractors Association, Inc. v. Pennsylvania, ___ U.S. ___, 50 U.S.L.W. 4975 (June 29, 1982), which rejected the theory of vicarious liability as between two separate, autonomous employing units as we have here. See Footnote 10, supra.

reasons not advanced this as a specific explanation for any of its employment decisions involving the relative qualifications of black and white employees.[66] Nevertheless, it is a matter of common knowledge that the quality of education provided by the predominantly black institutions in this and other states simply has not measured up to that afforded by institutions such as NCSU which enjoy international reputations for

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66 The reluctance of the authorities in the Extension Service to acknowledge this fact was evidence in Chancellor Caldwell's October 29, 1971 letter to the USDA in which he said: "We are willing to include this paragraph provided we can omit the words 'predominantly minority group.'; Our staff feels very strongly that the inclusion of these words in that sentence conveys to our 'predominantly minority group' schools and colleges an implication of inferiority in terms of curriculum and content. We do not feel that this is, in fact, necessarily true and therefore prefer that these three words be omitted from the sentence."

excellence in their academic programs.[67] Yet until recently virtually all of the black employees of the Extension Service, through no fault of their own, were

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[67] This is no idle observation, but one with which the plaintiff-intervenor here, the United States, has expressed agreement. There is on record in this court a brief filed May 2, 1979, by the United States Department of Justice in Civil Action No. 79-217-Civ-5, State of North Carolina v. Department of Health, Education and Welfare, in which it is charged among other things "respondent state and its agents have developed traditionally white institutions to a greater extent than traditionally black institutions of comparable age, original mission, or level of degrees conferred. For example: respondent state and its agents have developed white institutions which were founded at or about the same time as black institutions in such a way that the traditionally black institutions are academically inferior, having less extensive course offerings than the counterpart white institutions."

Other examples cited included the lack of post-graduate program in the traditionally black institutions and discrimination against A & T specifically in the development and distribution of land grant programs. See also Adams v. Califiano, 430 F. Supp. 118, 120 (D.D.C. 1977).

graduates of these black institutions. While there is nothing in the record to show that they have not performed commendably in the discharge of their duties, it is just not realistic to equate the educational qualifications of many of these graduates with those of the graduates of the white institutions which, as the government rightly alleges, have been so long favored in the field of education opportunities afforded. Agarwal v. Arthur G. McKee & Company, 19 FEP Cases 503 (N.D. Cal. 1977).[68]

[68] It must be borne in mind that even when a black's objective qualifications are equal to those of a white aspirant to the same position the law does not require the employer to prefer the black over the white. Rather, the employer has the discretion to choose among equally qualified candidates so long as the decision is not based on race. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981).

The court has been impressed by the absence in this case of evidence of so many of the usual badges of discrimination. For instance there was no evidence

- that there has been any discrimination in the employment by the Extension Service of non-professionals.[69]
- that any black ever applied for a position and was turned down on account of race.
- that the employment of any black was ever terminated for racial reasons.
- that blacks have ever been excluded from any particular job category.

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[69] In the original complaint of the named plaintiffs there was an allegation of such discrimination, but it was not brought forward in the amended complaint and no evidence was offered by the plaintiffs in support of the original allegation.

- that there is any difference in the entry level salaries of blacks and whites; and
- that any black has ever been excluded from membership in any 4-H or extension homemaker club on account of race.

Additionally, several of the named plaintiffs disclaimed any discrimination in their answers to interrogatories and many who did testify seemed reluctant to charge overt discrimination on the part of the Extension Service. The claims that were asserted were frequently based on subjective "belief."

The propriety of considering such negative evidence has been recognized by the Fourth Circuit.

> We also think the absence of other evidence of discrimination should be considered in determining whether a prima facie case is made, just as the

presence of other evidence of discrimination should be considered in arriving at the same conclusion.

Roman v. ESB, Inc, 550 F.2d 1343, 1350 (4th Cir. 1976). See also, Allen v. Prince George's County, 538 F. Supp.833, 853 (D. Md. 1982).

The court has likewise been impressed with the conscientious dedication of the Extension Service officials to achieving its affirmative action goals. For instance the court has found persuasive the uncontradicted evidence

- that it began its efforts to rectify pre-existing disparities between the employment opportunities of blacks and whites prior to the enactment of the 1972 amendment to Title VII which brought the Extension Service within its coverage.

- that the Extension Service employs the largest percentage of blacks of any similar service in the country.
- that the average salaries of blacks in the Extension Service have been increasing at a greater rate than those of whites.
- that instead of abandoning its camping programs as so many other states did, the Extension Service desegregated its camps and strengthened its programs.
- that it required the black and white agents associations to merge; and
- that Extension Services in states with minuscule black populations have made less progress in achieving equal employment goals than has

> the defendant here according to one witness for the plaintiffs. (Tr. p. 6585).

It is appropriate to consider such evidence as counterbalancing evidence of that presented by plaintiffs as indicative of discrimination. Swing v. Pullman-Standard, 539 F.2d 77. 104 (5th Cir. 12976).

> Recent progressive improvements are highly relevant in determining whether the employer is currently discriminating against black persons. Such improvements can counterbalance evidence of old historical conditions.

Williams v. Yazoo Valley-Minter City Oil Mill, Inc., 459 F. Supp. 37, 52 (N.D. Miss. 1978). United States v. County of Fairfax, 629 F.2d 942 (4th Cir. 1980), cited and relied on by plaintiffs for the contrary proposition is clearly distinguishable.

Of course the Extension Service has been under no obligation to restructure its employment practices in order to maximize benefits for minorities. Furnco Construction Corporation v. Waters, 438 U.S. 567, 577-8 (1978) Nor does the fact that the methods it has employed to insure equality of employment opportunities may not have been the most productive ones available or that they may not have been administered most effectively constitute a violation of the law. Allen v. Prince George's County, 538 F.Supp. 833, 855 (D. Md. 1982).

In summary the court has found that while there was ample evidence of disparate treatment of blacks by the Extension Service prior to the enactment of the Civil Rights Act of 1964, since that time this defendant has made conscientious and successful efforts to eradicate the

effects of past discrimination; that it has at no time engaged in purposeful discrimination; and that plaintiffs have fallen far short of establishing by a preponderance of the evidence that defendant has engaged in pattern and practice of discrimination. So long as its present policies are maintained and put into practice the Extension Service should be allowed to continue the great work in which it is engaged without interference from the courts.

> It does not further the purposes of Title VII to find liability in a union which has seemingly complied with the Act's provisions since its enactment in 1965. We must carefully balance the need for effective enforcement of the Act against overzealous enforcement which can only lead to resentment and a resistance to change.

EEOC v. Local 14, International Union of Operating Engineers, 553 F.2d 251, 255 (2d Cir. 1977).

The Supreme Court has recently urged voluntary compliance by employers and employees with legal requirements in order to avoid the "often ponderous pace" of litigation of the type this case so painfully represents. Ford Motor Company v. EEOC, 50 U.S.L.W. 4937, 4939 (June 28, 1982). In a similar context this court had occasion to give like counsel to two of the parties in this case, the United States and the University of North Carolina, see State of North Carolina v. Department of Health, Education and Welfare, 480 F.Supp. 929 at 940 (E.D.N.C. 1979). The court now renews the hope that the parties here will govern themselves accordingly.

An order will enter dismissing the pattern and practice suit of the United States as plaintiff-intervenor. There remains the matter of the claims of the fifty-five individual plaintiffs, and these will be the subject of a separate memorandum of decision and order.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 20, 1982.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed August 20, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,

Plaintiffs,

AND

UNITED STATES OF AMERICA, et al.,

Plaintiff-Intervenors,

VS.

WILLIAM C. FRIDAY, et al,

Defendants.

ORDER OF DISMISSAL AS TO
CERTAIN INDIVIDUAL CLIAMS

In this employment discrimination action the defendants filed and served upon the fifty-five named plaintiffs on December 14, 1979 interrogatories in which

it was sought to have each plaintiff identify his or her specific individual claims and the basis for such claims of alleged racial discrimination by the North Carolina Agricultural Extension Service. Thereafter a motion to compel the individual plaintiffs who had not answered these interrogatories to answer them was filed, and at a hearing held on this motion before a United States Magistrate on December 15, 1980, counsel for the plaintiffs were requested to inquire of the individual plaintiffs who had not filed answers to the interrogatories as to whether they were interested in continuing to prosecute the action and suggesting that consideration be given to the dismissal of the action as to any party who did not care to prosecute the same further. On July 29, 1981, the court entered a further order directing plain-

tiffs to answer the interrogatories of the defendants, but at the time of the trial a number of them whose names are listed below had failed to do so.

James P. West

Roosevelt Lawrence

Eva L.Greens, Administratix of the Estate of Cleo Rich Greene

Warren Barnes

Cassius Williams

Samuel Taylor

Hoover M. Royals

Thelma Graves Turner Administratric of the Estate of J. A. Turner

Clarence Stockton

J. M. Spaulding

Joyce Hunter

On the authority of Roman v. ESB, Inc., 550 F.2d 1342, 1349 (4th Cir. 1976), it is now

ORDERED that the individual claims of the foregoing named plaintiffs be and the same are hereby dismissed with prejudice.

At the trial of this action which extended over a period of approximately ten weeks the plaintiffs whose names are listed below failed to appear and give testimony concerning their respective claims of discrimination.

Henry Revell

Chester Stocks

E.C. Short

Calvin Pargrave

Robert Lee Lancaster

Clifton Parker

Dorothy M. Hearns

Louise Penn Slade

Alma Hobbers

Inex Foster

George Koonce

Lloyd Peace

Marilyn Rich White

Mary Crawford

Elizabeth Ivey, Administratrix of the Estate of D. O. Ivey

Essie Moore

On behalf of these plaintiffs exhibits were offered showing salary comparison between them and certain white employees, but there was no evidence to show the

relative qualifications and job performances of these plaintiffs and those of the persons with whom they were sought to be compared, and this evidence standing alone was not sufficient to create a prima facie case of discrimination. The motion of the defendants to dismiss the individual claims of the foregoing plaintiffs must therefore be and is hereby allowed and the action as it relates to these named plaintiffs is dismissed with prejudice.

s/s

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 20, 1982.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed September 17, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,
Plaintiffs,
AND
UNITED STATES OF AMERICA, et al.,
Plaintiff-Intervenors,
VS.
WILLIAM C. FRIDAY, et al,
Defendants.

JUDGMENT

The individual claims of the named plaintiffs in this action having been considered and decided in a memorandum of decision this day filed, in accordance therewith it is now

ORDERED, ADJUDGED AND DECREED that all of the individual plaintiffs not heretofore dismissed by separate order including, but not by way of limitation, the plaintiffs named below, are not entitled to recover of the defendants, or either of them, by reason of any matter alleged in the complaint and the amended complaint filed herein:

P.E. Bazemore
James E. Wright
George E. McDaniel
Plese Corbett
Fred Belfield
W. N. Payton, Jr.
L. C. Coopler
Chester L.Bright
Johnnie Jones, III
Haywood E. Harrell
W. B. Waymer
Booker T. McNeill
Richard M. Edwards
L. D. Baldwin
Leroy James
Cliftono M. Grines
Avant P. Colemaqn
Percy W. Williams
W. C. Strowd
Fletcher Barber
R. E. Wilkins
J. J. Wallace
S. T. Lloyd
Hernando F. Palmer
W. F. Wright
Earl G. Swann
I. W. Murfree
Mary C. Martin
Martha B.Thomas
Ann Coston
Esther B. Roscoe
Minnie B. Taylor
Pennie P.Battle
Joann Fleming
Jeannette B. Sherrod
Carrie U. Lindsey
Geraldine H. Ray
Mary I. Parham
Deborah Jean Hart
Merhan Hinton
Bernie STaton
Marian Staton

and that the action be and the same is hereby dismissed as to all of the individual plaintiffs. Each side will bear its own costs.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

September 17, 1982.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed September 17, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,
Plaintiffs,

AND

UNITED STATES OF AMERICA, et al.,
Plaintiff-Intervenors,

VS.

WILLIAM C. FRIDAY, et al,
Defendants.

MEMORANDUM OF DECISION
(INDIVIDUAL CLAIMS)

In a memorandum of decision filed August 20, 1982 in this employment discrimination suit the court has found that the United States as plaintiff intervenor failed to establish by a

preponderance of the evidence that the defendants engaged in a pattern and practice of racial discrimination in employment and the provision of services in violation of 42 U.S.C. §§ 1981, 1983, 2000d, et seq., and 2000e, et seq. In that memorandum, reference to which is made for further background information, the discrimination claims of the individual

named plaintiffs were reserved for decision.[70] In this memorandum their claims will be separately considered.

> The district court's finding of an absence of class-wide discrimination is not necessar-

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[70] In the memorandum these were said to be fifty-five in number. Actually seventy-four plaintiffs were named in the caption of the original complaint of whom five were not identified in the body of the complaint. By separate orders all but forty-two of those named have been eliminated from the case. In addition there were a number of witnesses who appeared and gave testimony in support of the government's pattern and practice suit, and the statement in the previous memorandum at page 14 that no such witness appeared was in error. The confusion arose from the fact that defendants had directed interrogatories to these witnesses, and they were treated as named plaintiffs in the proposed findings of fact submitted following the trial. Had the government prevailed in its pattern and practice suit they would have been entitled to relief as members of the class, but in view of the failure of that suit the fact that they did not intervene in the action of the original named plaintiffs they are no longer entitled to have their individual claims considered. Dickerson v. United States Steel Corporation, 582 F.2d 827, 834 (3d Cir. 1978); Croker v. Boeing Company, 662 F.2d 975, 997 (3d Cir. 1981).

> ily inconsistent with a claim that discrete, isolated instances of discriminations occurred, for which the statistical evidence of a pattern of discrimination may have been lacking; there may have been sufficient evidence to establish a prima facie case of discrimination directed against specific employees. Therefore, the court's decision as to the class-wide claims of discrimination does not, as a matter of res judicata, bar class members from asserting individual claims of personal discrimination.

Dickerson v. United States Steel Corporation, 582 F.2d 827, 830-31 (3d Cir. 1978).[71]

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[71] In their original complaint the named plaintiffs asserted a number of claims of a class-wide nature such as discriminatory work assignments, testing, recruitment and hiring practices, provision of services and maintenance of segregated clubs. These claims have all been considered and rejected in the judgment dismissing the government's pattern and practice suit and will not be considered further here.

To the extent that these plaintiffs seek to ground their action on Title VII of the Civil Rights Act of 1964 they are met at the outset with the defense that all but seven of them failed to comply with the administrative remedy provisions of that Act.[72] While, nothing else appe-

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[72] The government filed its amended complaint alleging violations of Title VII in 1975 but the named plaintiffs did not file their amended complaint with similar allegations until November 30, 1981, one week before the trial. It simply alleged that seven of the named plaintiffs "Avant P. Coleman, Clifton M. Grimes, Mary C. Martin, Minnie B. Taylor, Fred Belfield, Jr., Henry Revell, Jr., and Chester Stocks, by and through their attorney, Cressie H. Thigpen, Jr., received a letter dated November 18, 1981, from the United States Department of Justice, Civil Rights Division, advising them of their right to institute an action in an appropriate United States District Court pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 §u.s.c. § 2000(e), et seq., within 90 days of receipt of the letter." There is nothing in the record to show that any of the other named plaintiffs filed charges with the EEOC or that they ever received right to sue letters.

aring, this failure to file timely charges with the EEOC and to obtain right to sue letters would seem to be fatal to the Title VII claims of the non-complying plaintiffs, United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844, 887 (4th Cir. 1979); Stebbins v. Nationwide Mutual Insurance Company, 382 F.2d 2167 (4th Cir. 1967); Lay v. Bethlehem Steel;, 542 F. Supp. 9 (D. Md. 1982), aff'd 681 F.2d 814 (4th Cir. 1982), the court has chosen to consider the claims of all plaintiffs

under their properly alleged causes of action grounded on 42 U.S.C. § 1981.[73] This statute provides in pertinent part that:

> All persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... and to the full and equal benefit of all laws and proceed-

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[73] It has now been established that the requirement of timely filing of a charge with the EEOC is not a jurisdictional prerequisite but is subject to equitable tolling, Zipes v. Trans World Airlines, Inc, ___ U.S. ___, 102 S.Ct. 1127 (1982); Walters v. Robert Bosch Corporation, ___ F.2d ___ (4th Cir., July 7, 1982), but the plaintiffs here offered no evidence to support a finding that the tolling doctrine should apply. In any event, since the claims of all plaintiffs are being considered under Section 1981, it is not necessary to address the issue. Similarly the question of whether those plaintiffs in a non-class action who have not complied with the administrative requirements of Title VII may rely on the compliance by other plaintiffs with substantially identical claims does not arise. See Dalton v. Employment Security Commission, 671 F.2d 835 (4th Cir. 1982); Allen v. United States Steel Corporation, 665 F.2d 689 (5th Cir. 1982); Crawford v. United States Steel Corporation, 660 F.2d 663 (5th Cir. 1981).

> ings for the security of persons and property as is enjoyed by white citizens. ...

It has now been established that in order to maintain a cause of action for racial discrimination in employment under this statute it is necessary for the plaintiff to allege and prove purposeful discrimination. General Building Contractors Association v. Pennsylvania, ___ U.S. ___, 50 U.S.L.W. 4975 (June 29, 1982).

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. ... It implies that the decision-maker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Resolution of the issue of intent depends largely on the credibility of the witnesses. Morrison v. Nissan Motor Company, Ltd., 601 F.2d 139 (4th Cir. 1979).

The initial burden on the plaintiff in an action grounded on racial discrimination in employment is to establish a prima facie case. This may be done by showing that the plaintiff belongs to a minority race and that he was qualified for an employment benefit which was denied him because of his race. The burden then shifts to the employer to articulate a legitimate non-discriminatory reason for the employment decision in question. This is not strictly speaking a burden of proof but is simply the burden of producing an explanation. Once this is done it is open to the plaintiff to show that an otherwise valid explanation advanced by the employer

is in fact a mere pretext for the action taken. The burden of persuasion remains with the plaintiff throughout to establish a violation of his employment rights. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The issue of pretext is essentially one of a state of mind, and ordinarily evidence bearing on the issue will be circumstantial in nature. Wright v. National Archives & Records Service, 609 F.2d 702, 716 (4th Cir. 1979).

While historical inequality of treatment of black workers may certainly be considered on the question of present discrimination, evidence of such standing alone does not suffice to establish a prima facic case. Furnco Construction Corporation v. Waters, 438 U.S. 567, 573-4 (1979). An employer must show that its employment decisions were based on

legitimate considerations, but he does not have to show that his hiring procedures were calculated to maximize the hiring of minority employees.[74] Id. at 577; and "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated by Congress they should not attempt it," id. at 578.

Where a black's objective qualifications are equal to those of a white aspirant to the same position the law does not require the employer to prefer the black over the white. Rather, the employer has the discretion to choose among equally qualified candidates so long

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[74] "[The employer's] decision to discharge Dr. Berkowitz may well have been an error in business judgment. However, the law does not prohibit a company making errors in its personnel decision, so long as it does not discriminate on the basis of age, race, gender, or religion." Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209, 1219 (E.D. Penn. 1982).

as the decision is not based on race. Texas Department of Community Affairs v. Burdine, supra, at 259.

Testimony of a plaintiff that he is qualified for a particular employment benefit is entitled to little weight. Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980; Lovelace v. Sherwin-Williams Company, ___ F.2d ___ (No. 80-179, 4th Cir., June 15, 1982)(Slip Opinion at 3).

With these principles in mind we turn now to a consideration of the claims of the named plaintiffs who remain in the action, all of whom are black. Their claims will be considered in the order that their names appear in the caption of the original complaint.

1. P.E. BAZEMORE.

Prior to his retirement in 1981 Mr. Bazemore was employed as an agricultural extension agent in Edgecombe County and

Union County for thirty years. He had a BS degree and had earned additional hours toward an advance degree. His areas of responsibility included cotton, swine, corn and grain sorghum. He claims that he was denied appointment as county extension chairman in Union County in 1976 on account of his race and that he also suffered discrimination with respect to his salary.

Bazemore was one of two applicants for the Union County position in 1976. The other candidate, M. C. Howell, was also a member of the Union County staff. The Extension Service conceded that Bazemore had provided leadership and had conducted good extension programs in the county through the years. His primary area of expertise was swine, and he operated his own swine farm. Howell had a BS degree and had been in charge of the

4-H program in Union County for eleven years. Following an interview by the Extension Service officials in Raleigh Howell was recommended for the Union County chairmanship. A fellow worker, also black, corroborated Bazemore's contention that he was competent to discharge the duties of county chairman in Union County. His tenure with the Extension Service was more than twice that of Howell.

The evidence showed that Howell had provided outstanding leadership in the 4-H program in Union County and that the program was regarded as the best one of its kind in North Carolina and one of the best in the nation. Howell was recognized nationally as an authority in 4-H volunteer leadership training and had served at the national 4-H center in Washington with responsibilities for training volunteer

leaders from other states' organizations. Almost all of the national 4-H winners from North Carolina in 1976 were from Union County.

In 1976 Howell had almost completed his work toward a master's degree in adult education, and he did obtain his degree thereafter. During his interview with the officials in Raleigh Bazemore was asked whether he would pursue his work toward a master's degree and he indicated that at that stage in his career he would not be interested in completing the work necessary to obtain a master's degree.

With respect to his salary claim it appeared that Bazemore was one of the highest paid agents employed by the Extension Service, and it was shown that in many instances he earned more than white agents with greater tenure and advanced degrees.

Assuming that Bazemore made out a prima facie case of racial discrimination, at least with respect to the failure of defendants to recommend him for the position of county chairman of Union County, the court is satisfied that in recommending M. C. Howell for the position the Extension Service simply made a choice between two qualified candidates and that there was no evidence to substantiate Bazemore's claim that the failure to recommend him was racially motivated. The fact is that the Extension Service three years earlier had suggested to Bazemore that he allow his name to be submitted for the county chairmanship in Montgomery County, and he declined to do so because he was already earning more money in Union County as an agent than he would have earned in Montgomery County as Chairman. As was shown in the previous memorandum

there was evidence that Bazemore was given preferential treatment with respect to his areas of responsibility in Union County. See page 23, footnote 15, of the memorandum of decision filed August 20, 1982.

The plaintiff Bazemore having failed to offer any evidence on the basis of which the court find that the reasons assigned by the Extension Service for the failure to recommend Bazemore for the county chairmanship of Union County and any possible salary discrepancies were pretextual, all of his claims of discrimination must be rejected.

2. JAMES E. WRIGHT.

The plaintiff Wright has been an agricultural extension agent in Hertford County for over thirty years. He alleges racial discrimination in his failure to be appointed as county extension chairman in that county when vacancies occurred in

1969 and 1979.[75] Wright also complained that he was discriminated against with respect to his salary.

In 1951 Wright received a BS degree in agricultural economics from A & T University, and since that time he has earned approximately twelve credits toward a master's degree. He taught vocational agriculture before joining the Extension Service in 1955. In 1962 he became the Negro county agent in Hertford County and assumed supervisory responsibilities over the Negro Extension Service in that county. His performance record with the Extension Service has been a very good one. He has received numerous awards including the Distinguished Service Award

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[75] With respect to the 1969 vacancy Wright testified that he did not apply for the position because he thought it would be futile to do so. For the reasons stated in the previous memorandum (pages 34-36) Wright's futility" claim was rejected.

for the National Association of County Agricultural Agents. He has held positions of leadership in various organizations associated with extension work.

In 1979 Wright was one of three applicants for the position of county extension chairman in Hertford County. The other two were James Doughtry and Billy Dunham, both white. Daughtry had been a member of the Extension Service staff in Hertford County prior to 1976, but at the time he applied for the chairmanship in 1979 he was employed by a bank. While a member of the Hertford staff there had been some friction between him and Wright over the location of some office furniture.

Dunham was an extension agent in Bladen County at the time that he applied for the chairmanship in Hertford, and while he had only a few years' experience

in the Extension Service, he had taught vocational agriculture in the public schools and had been the manager of a large farm equipment company in which position he supervised a large staff. In his first assignment with the Extension Service in Brunswick County he had taken a low productive agricultural program and turned it around within two years. He headed one of the most outstanding educational programs in the state. He had a reputation for relating well to people and was a good organizer who had received much commendation from his superiors.

Following the interviews conducted by the Extension Service officials in Raleigh Doughtry, who was the only one of the three candidates who had a master's degree, was eliminated. It was the court's impression that although Doughtry was considered to be well qualified for

the position of county chairman, in view of the friction which had existed among members of the Hertford County staff while Doughtry was employed there it would not have been prudent to return him to a position in that county.

The selection committee was thus left with two candidates, Wright who was black and Dunham who was white. Josephine Patterson, who is the district extension chairman of the northweastern district in which Hertford County is located, was one of the four members comprising the selection committee. She is black. After a full consideration of the relative qualifications of Wright and Dunham the selection committee voted unanimously to recommend Dunham to the county commissioners of Hertford County to fill the county chairmanship vacancy.[76]

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[76] The statement on page 34 of the previous

As early as September, 1979, at or about the time that vacancy in the county chairmanship occurred in Hertford Dr. Paul Dew, the assistant director for county operations of the Extension Service, had discussed the problem of friction among the member of the staff with the chairman of the county commissioners of Hertford who expressed some concern over the situation. Apparently it was the consensus of all concerned in the selection process that in view of Dunham's excellent qualification here was a chance to get an outsider to come into Hertford - "someone who had not been a party to ten years of

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memorandum of decision that James Wright was recommended for the position of county chairman in Hertford and rejected by the county commissioners in favor of a white was inaccurate. In fact both Wright and Billy Dunham were found by the Extension Service to be qualified for the position but only Dunham was recommended to the commissioners who thus were not called upon to consider Wright's candidacy.

internal strife" (Tr. 5701) - to straighten out the intrastaff problems relating to personality conflicts and communication difficulties. It was for this reason and not for any racially motivated reason that the selection committee for the Extension Service agreed unanimously to recommend Dunham for the position.

Wright's contention that Dunham's selection was racially motivated centers on his version of the facts relating to the events which transpired on the afternoon and evening of the day when Dunham was presented to the county commissioners for approval. According to him, he had been led to believe that he was the favored candidate and that he would be taken before the county commissioners at a meeting to be held on the evening of December 17, 1979 at the county courthouse in Winton. When Dr. Dew and

Mrs. Patterson arrived with Billy Dunham at the county extension office in Winton that afternoon Wright says that he had to excuse himself very shortly in order to fill a previous appointment and that he did not understand that Dunham was to be the the only candidate presented to the commissioners that night. Instead, he says that he was told by Mrs. Patterson that they would call him and tell him when to come down for the meeting. He says that he went home around 6:00 p.m. and took a nap only be informed by a telephone call from Patterson around 8 o'clock that night that Dunham had been presented to the commissioners and approved by them to fill the chairmanship vacancy effective February 1, 1980.

Both Dew and Patterson gave quite a different version of what transpired on that afternoon and evening. They say that

the purpose of their taking Dunham to the extension office that afternoon was to introduce him to the members of the staff, including Wright had he stayed around, and to inform them that Dunham would be presented to the commissioners that evening for approval as the new county chairman. The say that the purpose of calling Wright was to take Dunham by his home and introduce him that night since he had only met Dunham briefly that afternoon. Dew, Patterson and Dunham did in fact visit with Wright that evening at which time Dunham was very cordially received and Wright pledged him his full cooperation as a member of his staff.

The court was very favorably impressed with James Wright, and it is with regret that it is unable to credit his testimony in this respect. If he was subjected to the kind of treatment he

claims he received on that occasion, both Dew and Patterson were guilty of a most callous disregard of his feelings. Yet these two Extension Service officials came across as fair-minded individuals who would not have been guilty of such conduct, particularly in view of the fact that it would certainly have been counter-productive in their aims to rectify the longstanding internal friction problems with which the Hertford extension staff had been beset. Moreover, if the Dew and Patterson version of the events of December 17, 1979 is not correct, it would have been a simple matter for Wright to have brought one or more of the members of the Hertford staff to give their version of what transpired at their meeting with Dew, Patterson and Dunham that afternoon. No such witness appeared. The court also

considered it significant that neither Dew nor Patterson was subjected to any serious cross-examination on this subject.

We are left, then, with a situation in which two qualified candidates were considered to fill one position. The court is unable to say that the evidence proved either one to be more qualified than the other. Under these circumstances, absent a showing of racial motivation, it was open to the Extension Service to recommend either one of the candidates. No such showing has been made. The fact is that all of the evidence showed that James Wright has always been highly regarded by the officials in the Extension Service. For instance, in the early 1970's Wright was offered the opportunity to come to Raleigh, study for a master's degree and be given the position of specialist, a

more prestigious state level position than that of county chairman. Wright turned this offer down, and it was offered to another black who accepted and was given the specialist position. More recently when Dunham resigned the county chairmanship in Hertford County after having done "an extremely effective" job with respect to the program and achievement of staff harmony, Wright was recommended over two other applicants, one white and one black, for the position created by Dunham's resignation, and he was approved by the commissioners on June 7, 1982. On July 1, 1982, he assumed the duties of county chairman of Hertford County.

With respect to his salary claim Wright testified simply that he knew of no other white agent with the same or less

tenure and education than himself who was earning more money than he. This claim has not been substantiated.

In summary, even if it be assumed that the evidence sufficed to create a prima facie case of discrimination, the reasons advanced by the Extension Service for its failure to recommend him for the county chairmanship of Hertford County in 1979 were legitimate and reasonable, and plaintiff Wright has failed to produce evidence to show that these reasons were pretextual. His salary claim was not supported by evidence, and it follows that his claims of discrimination must be rejected.

3. GEORGE E. McDANIEL.

McDaniel was first employed by the Extension Service as Negro county agent in Jones County in late 1946, and he served there until 1949 when he moved to Wayne

County where he remained until his retirement in 1975. He held a BS degree from A & T and at the time of his retirement had approximately twenty-one hours of graduate work toward his master's degree. In 1972 he was one of eight applicants for the position of county chairman in Lenoir County, a position he alleges was denied him because of his race. He also alleges racial discrimination with respect to his salary.

Four of the eight applicants for the county chairmanship of Lenoir County, including McDaniel, were recommended by the Extension Service to the Lenoir County Board of Commissioners. W. S. Lamm, a white with twenty-one years of Extension Service experience and an MS degree, was selected over the other three candidates. Lamm's area of expertise was tobacco which is the principal crop in Wayne County.

Lamm has established a reputation for leadership by organizing the first agri-business council in Wayne County and the first young tobacco farmers association in North Carolina. McDaniel had six years more tenure than Lamm but only a BS degree and his areas of responsibility had included soybeans and dairying. His claim that he was better qualified for the position than Lamm has not been substantiated, but in any event the final selection was made by the county commissioners of Lenoir County and not the Extension Service, and there is no evidence to support McDaniel's claim that he was discriminated against on account of his race with respect to his failure to be appointed as county chairman in Lenoir County.

In support of his salary discrimination claim McDaniel offered evidence tending to show that there were white agents with less tenure who earned more than he did. Defendants, however, offered evidence tending to show that there were white agents with greater tenure who earned less than McDaniel. There was no evidence on the basis of which the court could compare the job performance of the various agents whose salaries were sought to be compared.

4. PLESE CORBETT.

Corbett graduated from A & T with a BS degree in 1938. Two years later he obtained a master's degree from the University of Massachusetts. He was employed by the Extension Service from November 16, 1940 until his retirement in

1973. He claims that because of his race he was discriminated against with respect to his salary.,

Corbett was employed in Alamance County, and although he had a twenty-five years of tenure at the time of the merger of the two branches of the Extension Service in 1965, he did not apply for the county chairmanship at that time. His area of responsibility included fruits and vegetables, soybeans, small grains and community resource development. Through the years he showed little interest in continuing and updating his expertise, and although continuing educational programs were available, during the last ten years of his service he only spent eleven days in such programs.

Corbett first complained about his salary in 1971 after his tenure qualified him for retirement, and as a result of his

complaints he received increases in his salary. Thereafter he made no more complaints concerning his salary prior to his retirement in 1973.

While a comparison of Corbett's salary with the salaries of various selected white agents tends to indicate some disparity, at least two of the white agents whose salaries were compared were county chairmen, and as previously noted this position carries a somewhat higher salary than that of agents. Also lacking is evidence from which a comparison of the job performances of the various agents with that of Corbett could be made.

The court is unable to find from a preponderance of the evidence that Corbett was the victim of racial discrimination with respect to his salary, and his claim must therefore be rejected.

C 5. FRED BELFIELD.

Belfield has been an agricultural and 4-H agent in Nash County for twenty years. He received a BS degree in agronomy at A & T in 1958 and a master's degree from NCSU in December 1977. He has supplemented his education by taking various other courses through the years. He alleges that he should have been selected to be county chairman in Northampton, Vance and Nash Counties when vacancies occurred in those counties; that he was unjustly reprimanded by the Extension Service for administering corporal punishment to an unruly 4-H camper; and that he has been discriminated against with respect to his salary, all on account of his race.

In 1974 Belfield was one of three applicants for the position of county chairman in Northampton County. The two

other applicants were white, one of whom had seventeen years' tenure in that county and a master's degree in animal husbandry and the other of whom had only seven years of experience and a BS in agronomy. The Extension Service recommended all three of the applicants to the Board of County Commissioners of Northampton County, and they selected the white candidate with the least tenure but whose areas of expertise, cotton and peanut, were best suited to the needs of that county. Since he was recommended for the position along with two other applicants it is hardly open to Belfield to content that he was the victim of racial discrimination on the part of the Extension Service with respect to his failure to be appointed to the position of county chairman of Northampton County. The selection made by the county commissioners of Northampton County appears to

have been based on legitimate considerations, but in any event the commissioners are not parties defendant to this suit.

The reprimand complained of arose out of an incident which occurred at one of the 4-H camps in June of 1978. Belfield was responsible for the Nash County contingent of 4-H campers that year. The evidence shows that he administered corporal punishment to an obstreperous camper under his supervision by striking him with a belt on one occasion and grabbing the boy by the arms and dragging and choking him on another. Although Belfield alleges that the Extension Service had no formal policy forbidding corporal punishment, the evidence showed that it was in fact the policy simply to dismiss an unruly child and send him home. The letter of reprimand for his error in judgment in inflicting corporal punishment

appears to have been justified. In any event, the evidence does not support a finding that the reprimand was racially motivated.

In 1980 Belfield was one of two applicants for the position of county extension chairman in Nash County. At that time he had nineteen years of experience in Nash County and had obtained his master's degree. The other applicant for the position, James Stephenson, had thirteen years of Extension Service experience about twelve of which had been in Nash County where he had conducted an outstanding tobacco program. Stephenson had also received a fellowship which permitted him to take additional courses to improve his technical knowledge in the field of tobacco, and he had been ranked in the first quartile for the previous five years. At the time he applied for

the vacant chairmanship position in Nash County Stephenson had been serving as county extension chairman in Vance County for fifteen months. At best the evidence simply shows that both the candidates were qualified for the Nash County position in 1980, and in the absence of any evidence showing that Stephenson was recommended over Belfield because of racial animus, Belfield's discrimination claim with respect to his failure to be appointed as county extension chairman in Nash County in 1980 must fail.

When James Stephenson returned to Nash county to accept the position of county extension chairman in 1980 it created a vacancy in the same position in Vance County for which Belfield again made application along with two other applicants, Phyllis Stainback and Donald Cobb. Stainback was a home economics agent with

twenty years of experience and a master's degree which Cobb had only five years of Extension Service experience and a master's degree in crop production. Cobb had received a fellowship to pursue additional studies in tobacco and had established the first integrated pest management program while serving as an Extension Service agent in Granville County. The evidence showed that Vance County required a county chairman with expertise in tobacco. Despite having less tenure than the other two applicants the Extension Service recommended Cobb for the position because of his expertise in tobacco and demonstrated leadership in all of his program responsibilities, and the recommendation was accepted by the Board of County Commissioners of Vance County.

There is no evidence to support Belfield's contention that the failure of the Extension Service to recommend him for the Nash and Vance County positions in 1980 was attributable to the reprimand which he received following the 4-H camp incident in 1978. Given the particular needs of the two counties, the evidence showed that in each instance the candidate selected had better qualifications for the position than did Belfield. The evidence of the defendants showing legitimate, non-discriminatory reasons for the selection of other candidates for these two positions has not been shown to be pretextual, and Belfield's claims with respect to the Nash and Vance County chairmanship appointments must fail.

With respect to his salary claim the evidence showed that Belfield compared his salary with that of a county extension

chairman and a specialist. Given the different responsibilities of these positions such comparisons do not prove a prima facie case of discrimination. Here again the evidence also failed to show that Belfield's performance was in any way better than that of the agents with whose salaries he sought to compare his own. In short, Belfield has failed to substantial his claim of salary discrimination and it must therefore be denied.

6. W. N. PAYTON, JR.

Payton, a 1938 graduate of A & T with a BS degree in agricultural education, taught vocational agriculture for six years prior to joining the Extension Service in 1944. He was employed in Jones County for two years and then moved to Lenoir County where he served until his retirement in 1975. In answer to interrogatories Payton assigned salary as his

only discrimination claim, but at the trial he testified that he applied for but was not selected as county extension chairman in Lenoir County in 1972 because of his race. The Extension Service has no record of any such application, but it does appear that when the vacancy occurred in Lenoir County in 1972 Payton was appointed as acting county chairman in which position he served for one month.

"As previously stated in the foregoing section dealing with the George McDaniel claim, there were eight applicants for the position of county chairman in Lenoir County in 1972 four of whom were recommended by the Extension Service to the county commissioners. Payton was not one recommended, but another black, McDaniel was recommended. The appointment went to W. S. Lamm, who was found by the commissioners to be the best qualified of

the candidates. Payton testified that he "felt" that he was equally as qualified for the position as was Lamm, but no other evidence supported this assertion. In short, Payton failed to substantiate his claim of discrimination in promotion.

With respect to his salary discrimination claim the evidence showed that Payton's salary was comparable to that of white agents who had appreciably less tenure. The evidence failed to prove that any disparity was predicated on race rather than performance, and it would be sheer speculation to find otherwise. All of Payton's claims are rejected.

7. L.C. COOPER.

A 1943 graduate of A & T with a BS de-gree in horticulture, L. C.Cooper served three years in the Air Force and then taught veterans vocational agriculture from 1947 to 1954 when he joined the

Extension Service in Wayne County. He has taken some graduate work at NCSU but has not received his master's degree. He alleges that the Extension Service discriminated against him with respect to the county chairman vacancy which occurred in Warren County in 1969 and also with respect to his salary.

Cooper transferred from Wayne County to Warren County in 1958 as supervisor for the agriculture Negro program there. In 1969 when a vacancy occurred in the position of county chairman of Warren County Cooper was asked in a luncheon meeting with the director of the Extension Service in Raleigh if he would consider applying for the vacancy. At the same time he was informed that a Mr. Hardage and another individual had also made an application for the position. Although the Extension Service highly recommended

Cooper for the position the Board of County Commissioners selected Hardage who, so the evidence showed, had more tenure and more administrative experience than Cooper.

Notwithstanding this setback the Extension Service continued to show an interest in Cooper and encouraged him to apply for a Kellogg fellowship at NCSU which was thereafter awarded to him so that he might enroll in a graduate program to earn his master's degree. Because of his low grades he eventually dropped out of the master's program but was nevertheless selected as county chairman of Warren County when the next vacancy occurred in 1979, a position which he held until his retirement in early 1982. The evidence falls far short of establishing that his failure to be appointed as county chairman

in Warren County in 1969 was in any way attributable to racial discrimination on the part of the Extension Service.

Cooper also claimed that his salary was inferior to that of white agents, but he offered no evidence to substantiate his claim. Instead, the evidence showed that there were several white agents with graduate degrees who became county chairman who earned less money than he did. Cooper's salary claim must also fail.

8. CHESTER L. BRIGHT.

This employee of the Extension Service graduate from A & T in 1938 with a BS degree in agriculture and science. Thereafter he took graduate courses at NCSU but never obtained a master's degree. he taught school from 1938 to 1943 and worked at a shipyard during World War II. He assumed a position with the Extension

Service in Beaufort County, North Carolina in 1949 which he held until the time of his retirement in 1975. He testified that "my allegation of discrimination is salary and advancement, or failure to have an opportunity to advance or get promotions."

At the time of the merger of the two branches of the Extension Service in 1965, Max Chesnutt, a white, was appointed to the position of county chairman in Beaufort County. Bright testified that he did not have an opportunity to apply for the position at that time, but there was no explanation as to why he was unable to apply. Unlike many of his co-plaintiffs, Bright did not testify that he was as well or better qualified for the position than Chesnutt. There was no evidence of racial discrimination against Bright in this connection.

With respect to his salary claim, it appeared that with the exception of Chesnutt, the county chairman, Bright was the highest paid agent in the county. The position of county chairman, of course, carried a higher salary than that of an agent, and there is no evidence to support this plaintiff's salary claim.

9. JOHNNIE JONES, III.

Jones was employed by the Extension Service in Greene County in 1971. The following year he transferred to Craven County where he was promoted to associate agent and given a salary raise. A year later he transferred to Durham County where he worked exclusively in urban 4-H" work under a black county chairman. In 1978 he transferred to Lenoir County to work as an agricultural agent. He claims racial discrimination in the areas of title promotion and salary.

In answer to the defendants' interrogatories Jones stated that he had been discriminated against with respect to a title promotion in 1978, but he made no reference to this in his trial testimony. Evidence for the defendants showed that Jones did apply for a promotion from associate to full agent in 1978 while he was still serving as a 4-H agent in Durham County, that his county extension chairman, also black, recommended the promotion but that a review of his program by the district chairman and other officials in Extension Service management revealed that his 4-H program were declining when compared with prior years and that his performance did not merit promotion. The court finds that the denial of the requested promotion was based upon Jones' substandard performance and not upon race. It was at that time that Jones abruptly

applied for the transfer to Lenoir County where he was allowed to switch from 4-H work to agriculture.

Jones' salary claim has already been the subject of a rather full discussion (see pages 44-47 of the previous memorandum of decision), and this discussion will not be repeated here. Suffice it to say that Jones sought to compare his salary with that of another agent who worked in a different field of responsibility in which he had a rare but much needed expertise and that it had been necessary for the Extension Service to pay him a higher salary than he was earning with the North Carolina Department of Agriculture in order to obtain his services in Lenoir County. Jones had failed to make a prima facie case of discrimination on either of his claims, and they will therefore be denied.

10. HAYWOOD E. HARRELL.

This employee joined the Extension Service in 1968 following his graduation from A & T with a BS degree in animal science. He was assigned to Halifax County where he worked for about six months before being drafted into the Army in which he served for nineteen months. He resumed his duties in Halifax County in 1971 and was assigned to do 4-H work. He testified that he felt he was discriminated against with respect to his salary relative to the salaries of comparable white agents.

At least some of the white agents whose salaries were thought by Harrell to be greater than his own were shown to have been making less than Harrell, and except for his own personal evaluation of his job performance which he described as "very good," there was no evidence from which

the court could make a comparison between his job performance and that of other agents. The defendants produced evidence, however, showing that Harrell had in fact been consistently placed in the third or fourth quartiles and that it had been necessary to give him special help in connection with his plan of work. Even so, it developed that Harrell is the second highest paid agent on the Halifax County staff and that the only agent earning more than Harrell has two more years of tenure.

This plaintiff has failed to make a prima facie case of salary discrimination, and his claim must therefore be denied.

11. W. B. WAYMER.

Waymer graduated from South Carolina State University in 1955 with a BS degree "in the principle of agriculture extension." After a period of service in the

military and in the Extension Service in Clemson, South Carolina he joined the Extension Service in this state in 1962. He spent four years in Wayne County and was then transferred to Mecklenburg County where he is still employed with areas of responsibility in energy resource development and housing. He testified that the trial that he believed he was being discriminated against with respect to his salary.

In 1976 Waymer used certain CETA trainees in his charge to paint a house which he owed. An investigation of the matter showed that he had accepted an illegal gift of the painting, and, admitting that he had made an error in judgment he repaid the appraised value of the gift He was given an oral reprimand which was in no way related to his race. He has rendered good service since that

time, and this is reflected in the fact that four years later he was making approximately $10,000 per year more than he was at the time of the incident.

The court is unable to find that Waymer presented a prima facie case for relief on any claim, and his claims must therefore be denied.

12. BOOKER T. McNEILL.

McNeill graduated from A & T with a BS degree in agriculture education in 1947, taught veterans classes in livestock and crop production for the Veterans Administration for four years and joined the Extension Service in1951 as an assistant Negro county agent in Wake County. Since 1954 he has been with the Extension Service in Cumberland County, and in 1972 he received his master's degree in agriculture education from A & T. He contends that although he did not

apply for the position of county chairman in Cumberland County in 1969 that he was as well or better qualified than the person who was appointed to the position. He also claims discrimination with respect to his salary.

In 1969 the Extension Service had not adopted a formal application procedure for filling county chairmanship vacancies, and potential candidates were informed of vacancies in many instances by word of mouth. They were asked by individual members of the Extension Service administration to apply for such positions. NcNeill along with two others was asked in 1969 if he would be interested in the position of county chairman for Cumberland County, and he said that he would. Thereafter Bruce Woodard, a white person,

was recommended to the county commissioners and by them accepted to fill the vacancy.

At the trial McNeill sought to bolster his claim of discrimination by calling as a rebuttal witness a former Cumberland County commissioner, E. J. Edge, who testified that it was his impression that the commissioners were told by the then district chairman that a master's degree was a prerequisite for the position of county chairman, but this evidence was refuted by testimony of the Extension Service officials. Admittedly Mr. Edge's recollection of events which had transpired twelve years prior to the time he gave his testimony was hazy, and the court is unable to credit his testimony concerning the events surrounding the selection of the county chairman in Cumberland County. That the Extension Service

harbored any racial animus toward McNeill would seem to have been completely negatived by its action in recommending McNeill for the county chairmanship in Cumberland County in 1976 when Woodard was chosen to assume the same position in Johnston County. McNeill has served as county chairman in Cumberland since 1976.

With respect to his salary claim the evidence showed that McNeill's salary was less than that of two agents who had earned their master's degree before he did. On the other hand defendants' salary comparisons showed that McNeill's salary was greater than that of several county chairman, some of whom had greater tenure in the Extension Service.

McNeill has failed to establish either of his claims by preponderance of the evidence, and they must therefore be denied.

13. RICHARD M. EDWARDS.

This employee graduated with a BS degree in agriculture education from A & T State University in Nashville, Tennessee in 1940. After teaching school for four years and helping his father on a farm he began work with the Extension Service in Bertie County where he spent the remaining thirty years of his employment before retiring on June 30, 1976. He claims that he was not given fair consideration for the position of county chairman in Martin County when that position came open in 1973 and that his salary was inferior to agents with similar tenure and education.

Edwards made application for the county chairmanship in Martin County in 1973 and was interviewed for the position, but he was not recommended to the board of commissioners. Neither was another applicant from the Martin County staff, P.

C. Bryant, whose qualifications were similar to those of Edwards. Later that year, however, Edwards was recommended for the position of acting county chairman in Martin County, a position which he accepted and held until early 1975.

The person eventually selected for the chairmanship in Martin, Leon Allen, had considerable experience in animal husbandry including experience as a specialist with the animal science department at NCSU. At that time Martin County had a growing livestock industry, and this was outside the area of Edwards' education, training and experience. Allen had a master's degree in animal husbandry.

Edwards had a problem with alcohol in the mid-1960's which caused him to have himself committed to an alcoholic treatment center at Butner, North Carolina. He stayed there only a short time, and there

was no evidence to rebut his testimony to the effect that he had been completely cured. There was evidence on the part of the defendants indicating that he lacked leadership qualities, a contension which, of course, Edwards disputed.

If, as Edwards contends, he was the victim of racial discrimination in the failure to recommend him for the county chairmanship of Martin County in 1973 when he was nearing retirement age, it is difficult to understand why such a discriminatory animus would not have resulted in the selection of a white to fill the position of acting county chairman of Martin County for a period of some eighteen or more months. Be this as it may, the court finds that the selection of Allen to fill that vacancy was based on legitimate, non-discriminatory reasons,

and Edwards has failed to establish even a prima facie case of racial discrimination in this regard.

His salary claim is likewise without merit. While he was able to produce evidence showing that some white agents with the same degree and less tenure earned more money than he did, he failed to show that his salary was not commensurate with his job performance as compared with those agents who made more money. Defendants also submitted evidence showing that there were white agricultural agents with greater tenure who earned less money than Edwards. His salary claim must also be dismissed.

14. L. D. BALDWIN.

Baldwin graduated A & T in 1949 with a BS degree in agricultural education. He has taken no formal graduate courses but did take numerous in-service courses. He

was first employed by the Extension Service in 1950 in Edgecombe and in the following year he was transferred to Franklin County where he served until the time of his retirement in 1979. He claims discrimination in job assignments and salary.

Upon his transfer to Franklin County Baldwin requested that he be assigned tobacco responsibilities but instead was given corn, CRD, 4-H and horticulture crops. He expressed displeasure with the CRD assignment, but the evidence showed this to be one of the four program components in extension work, and it is regarded as of the same or similar importance as the other three program areas. It further appeared that the majority of county extension chairmen are

assigned CRD responsibilities. Baldwin's claim of inferior work assignments was not substantiated.

Baldwin's claim of salary discrimination must also fail. The evidence based on a comparison of his salary with that of two white agricultural agents showed that in fact Baldwin had greater tenure and earned more money than these agents. In fact at the time of his retirement he was the highest paid agent in Franklin County excluding the county extension chairman. Baldwin's claims will be dismissed.

15. LEROY JAMES.

Leroy James holds a BS degree in animal husbandry from A & T which he received in 1957 and a master's degree in agricultural education awarded by the same institution in 1971. He has also done graduate work at NCSU and a number of in-service courses. He was first employed

as an assistant Negro county agricultural agent in Wayne County in 1958, and he transferred to Pitt County in 1961.

A vacancy in the county chairmanship in Pitt County occurred in 1965 following the merger of the two branches of the Extension Service, but James did not apply for the position at that time. The claim of the United States as plaintiff-intervenor that James' failure to apply was based on "futility" grounds has previously been rejected. See previous memorandum of decision at page. 35.

In 1976 James again applied for the position of county chairman, this time in Johnston County. He was recommended to the board of county commissioners along with two other agents for that position, but the commissioners selected Bruce Woodard, who at that time was serving as county chairman in Cumberland County, to

fill the vacancy. The evidence showed that Woodard was highly qualified for the position and there was no evidence to show that the failure to appoint James was in any way racially motivated.

The following year another vacancy in the county chairmanship of Pitt County occurred, and James was the only applicant recommended for this position by the Extension Service. He was accepted by the Board of County Commissioners of Pitt County and assumed the position shortly thereafter which he still holds. Far from indicating that James was the victim of discrimination it seemed to the court that at almost every turn James was given full if not indeed preferential treatment by the Extension Service. The court finds no discrimination with respect to James' opportunities and eventual promotions within the system.

While James failed to testify concerning any discrimination with respect to his salary, the salaries of various other agents and county chairmen were submitted for comparison with his own. While some of these comparisons showed that agents with similar degrees and tenure While earned more money that James in a given year, others showed that James earned more money than agents with greater tenure. The salary comparisons do not reflect the relative job performances of any of the agents. Explanations for any apparent discrepancies in the salaries of various agents and the named plaintiffs herein have been set forth more fully in the previous memorandum of decision and will not be repeated here.

In summary, James had failed to show that he has been the subject of discrimination in respect to any of the claims advanced by him in this action.

16. CLIFTON M. GRIMES.

Grimes graduated from A & T in 1954 with a BS degree in agricultural education, and he received a master's degree from the same institution in 1965. He served three years in the Air Force following his first graduation, and he was first employed by the Extension Service in September of 1959 in Bertie County. He transferred to Gates County in 1965 as an assistant Negro agricultural agent. In 1970 he applied for the position of county extension chairman in Gates County, and he alleges racial discrimination in his failure to receive the appointment. He also claims salary discrimination.

There were two candidates for the position of county chairman of Gates County in 1970, Grimes who was black and Talmadge Baker who was white. The Extension Service recommended each of the two candidates to the county commissioners of Gates and they selected Baker. Therefore Baker declined to accept the position, and it was thus left open again with Grimes as the only known candidate.

About this time the district chairman became aware that Grimes was having trouble with his personal financial affairs which had manifested itself in the giving of checks on his account which contained insufficient funds, a misdemeanor under North Carolina law. This matter was brought to the attention of the Extension Service officials in Raleigh, and it was determined that this development afforded sufficient reason for

withdrawing the Service's previous recommendation of Grimes to fill the position in Gates County for which he had applied. Except for his financial difficulties and the possible adverse effects his writing of bad checks might have on the image sought to be maintained by the Extension Service the evidence showed that Grimes was as congenial, courteous, cooperative worker who worked well with the clientele in the county. His performance evaluations had been high.

Based on this evidence the court finds that Grimes has presented a prima facie case of discrimination on the part of the Extension Service. After withdrawing his name the position remained open and the Extension Service continued to solicit applications from other extension agents. The burden of going forward and articulating some legitimate non-dis-

criminatory reasons for its actions was thereupon shifted to the Extension Service.

In discharging this burden the de-fendant showed that in spite of Grimes' positive working performance, he had had trouble managing his financial affairs and that he had a reputation for writing bad checks and for failing to settle his accounts on a prompt basis. Grimes conceded at trial that he had given checks which had been returned for insufficient funds. He had been told that as soon as he cleared up his financial problems that he would again be considered for a promotion, but as late as the time of the trial which was more than ten years after his rejection for the county chairmanship of Gates County Grimes was continuing to give bad checks. All of this had a direct

effect on his reputation in the community and his leadership and management abilities.

The person selected to fill the vacancy in Gates County in 1970, Zackie Harrell, did not have the required seven years of prior experience to become a county chairman, but he did have previous experience in the management of one of the largest farm operations in the state and the management and operation of a peanut-buying company.

In an effort to show that the reasons assigned by the Extension Service for withdrawing its recommendation of Grimes were pretextual the plaintiff called as a witness Mr.John Baggett, a banker from Gates County. Mr. Baggett testified that he had never heard of any instance when Grimes failed eventually to meet his obligations, and he stated that in his

opinion Mr. Grimes had a good reputation in the community both as an individual and as an extension agent. He further testified that notwithstanding Grimes had continued to give bad checks through the years and was slow in paying many of his obligations to the bank, that he would continue to make loans to Grimes. The case is a close one, but the court is unable to find from a preponderance of the evidence that the actions of the Extension Service in this instance were racially motivated. After all, an employer is not well served by an employee who continually violates the laws of the state even in such comparatively innocuous matters as writing bad checks. Although he was given an opportunity to get his financial house in order almost twelve years ago, Grimes apparently has not done so and would not be qualified for the position of county

chairman in Gates County if a vacancy should occur at this time. His claim of discrimintion with respect to the handling of his application for the county chairmanship of Gates in 1970 must be rejected.

Grimes' salary claim is based on a comparison of his salary with that of the county chairman, Zackie Harrell, from 1971 to the present time. As we have seen, given the difference in the responsibilities of extension agents and county chairmen such a comparison is not probative of discrimination. Also, the defendants presented salary comparisons which showed that Grimes earned more money than many white agents who had greater tenure. His salary claim must also be rejected.

17. AVANT P. COLEMAN.

Coleman received a BS degree in agricultural education from A & T in 1960, and in 1978 he received a master's of science degree in adult education and sociology at NCSU. He entered the employment of the Extension Service on September 1, 1962, and has been so employed in Wilson County since that time. Since 1968 he has been assigned to 4-H and CRD responsibilities, and at the present he works primarily with 4-H clubs including community project and special interest clubs. He is a member of the city council of Wilson. He claims discrimination with respect to his salary.

Coleman sought to prove his claim by comparing his salary with certain white employees of the Extension Service, one of whom was the county chairman. As we have seen, because of their greater responsi-

bilities county chairmen earn more than agents, and disparities between the salaries of the two groups do not support a finding of discrimination. Coleman also testified that he earns less than a home economics agent in the county, Patricia Edwards. The evidence showed, however, that Edwards has received widespread recognition for establishing homemaker clubs and that while Coleman's 4-H program in 1973 was judged to be one of the best in the state, it has suffered a sharp decline since that time with more than a two-thirds drop in membership in the clubs. This decline has coincided roughly with the period in which Coleman has been a member of the Wilkson city council. Although the Extension Service encourages agent involvement in nonpartisan community activities, the impression was gained that Coleman's involvement in political and

city council work has affected his performance as an Extension Service agent and that his present salary which is in excess of $20,000 per year is commensurate with his performance.

Coleman's claim of salary discrimination will be denied.

18. PERCY W. WILLIAMS.

Williams is a 1951 graduate of A & T in agriculture. He has taken some graduate work at A & T and NCSU since that time but has not obtained a master's degree. After teaching veterans farming for three years following his graduation Williams was employed by the Extension Service in the fall of 1954 in Wilson County. He transferred to Pasquotank County in 1957. His remaining complaint in the case is salary discrimination.

The evidence showed that Williams earned less money than two white agents who had similar degrees and less tenure, but the evidence for the defendant showed that Williams earned more money than some agents with greater tenure and master's degrees. There was no evidence from which the court could compare the job performance records of Williams with those agents who earned more money. His salary discrimination claim remains unsubstantiated, and it will therefore be denied.

19. W. C. STROWD.

Following his graduation from A & T in 1941 with a BS degree in agriculture Strowd worked as director of farm husbandry at a farm and vocational school in Pennsylvania for about two and a half years. He returned to North Carolina and became employed by the Extension Service in Perquimans County in 1944 as Negro

emergency war food production assistant. Strowd claims discrimination in the failure of the Extension Service to have him appointed county chairman in Perquimans County in 1969.

Strowd says that he expressed an interest in this position but was discouraged from applying by the departing county chairman who is alleged to have told him that he would be contacted by the Extension Service if it wanted to support his candidacy. At that time Strowd was the senior agent in Perquimans County with twenty-five years of experience. The evidence showed, however, that Strowd lacked initiative, drive and leadership qualities considered necessary to be a county extension chairman. On the other hand the evidence for the defendants showed that the person selected for the position, Richard Bryant, was well

qualified for the position and had demonstrated the requisite leadership qualities in Gates County where he has been the county extension chairman. The court finds that the selection of Bryant was predicated on his prior administrative experience and leadership rather than any racially discriminatory animus on the part of the Extension Service.

With respect to his salary claim Strowd's attempted comparison of his salary with that of the county chairman, for reasons previously stated, is without probative force. Similarly, the evidence tending to show that Strowd earned less money than some white agents with less tenure must be discounted for that Strowd failed to present any evidence showing the relative qualifications and job performances of the other agents.

All of Strowd's claims of discrimination will be denied.

20. FLETCHER L. BARBER.

Barber graduated from A & T with a BS degree in agricultural education in 1949. Later he took some post-graduate work but did not obtain a master's degree. Following college he taught school for one year and joined the Extension Service in Jones County in 1950. After serving two years in the Army he returned to the Extension Service in 1954 where he served until his retirement in August of 1981. He alleges discrimination in the failure to appoint him as county chairman of Jones County in 1978.

Barber and two others applied for the position, and each of them was interviewed by the Extension Service officials in Raleigh. Of the three applicants Minton Small received the recommendation of the

Extension Service, and he was appointed to fill the vacancy in Jones County by the county commissioners.

Central to Barber's claim is his contention that he was better qualified for the position than Small. The evidence failed to substantiate this claim. While Small's tenure with the Extension Service was only thirteen years as compared to Barber's twenty-five years, Small had a master's degree, with a specialist in tobacco and had served as county extension chairman of Caswell County for four years before applying for the Jones County position. While Small's quartile rankings had been low for several years, and his performance as county chairman of Caswell had been criticized by one of the black agents in that county, the evidence for the defendants showed that he had in fact performed creditably in his Caswell County

duties. In view of the fact that tobacco is the principal money crop grown in Jones County which had prompted the commissioners of that county to request that the county chairmanship vacancy be filled by one with expertise in tobacco, the decision of the Extension Service to recommend Small for the position was fully justified. The evidence will not support a finding that this decision was racially motivated.

Accordingly, Barber's claim must fail.

21. R. E. WILKINS.

Wilkins, a 1948 graduate of A & T with a BS degree in agriculture, was first employed by the Extension Service in Duplin County in April 1948. He served approximately thirty years, retiring in

1977. Questioned as to the nature of his complaint of discrimination Wilkins testified:

> I think it was not being given an assignment. From '65 until '70, I worked mostly with the other agents. I had no area of responsibility of my own until '69 - until '68, I believe - '65 to '68.

Wilkins testified that he complained about his work assignments in 1967 and that in 1968 he was given sole responsibility as "corn agent."

Evidence further showed that Wilkins had a complaint about his 4-H responsibilities, but the evidence showed that this complaint was resolved by mutual agreement of the county chairman and the other agents involved.

With respect to his salary claim Wilkins testified that he thought in view of his tenure that his salary was "terribly low." While he did not know of any

whites with less tenure who were making more money than he, salary comparisons were introduced in support of his salary claim. This evidence showed that Wilkins earned less than several other white agricultural agents with less tenure, but there was no evidence from which a comparison of his job performance with that of the other agents could be made. Evidence for the defendants showed that Wilkins earned more money than several other agricultural extension agents with greater education and tenure.

Wilkins has failed to prove his claims by a preponderance of the evidence, and they will be denied.

22. J. H. WALLACE.

Judy Herring Wallace graduated from Shaw University in 1965 with a BS in home economics. She began work with the Extension Service on January 1, 1966 in

Columbus County and on September 1 of that year she transferred to Duplin County where she has since been stationed. Questioned by her counsel as to why she joined as a plaintiff in this action she replied that "I felt there was some discrimination as it relates to pay - my pay."

She further testified that her curiosity had been aroused when she received a salary increase in 1971 at a time of the year when raises were not expected to be granted. She had no personal knowledge of what others in her organization were making, and salary comparisons offered in evidence on her behalf failed to substantiate her claim of salary discrimination. As in the cases of her co-plaintiffs previously discussed, there may have been instances in which agents with similar educational back-

grounds and less tenure were making more money than Wallace, but again the defendants submitted the names of several white home economics agents with greater tenure who were earning less than Wallace.

There was also a question on the part of this plaintiff that she was discriminated against with respect to some of her work assignments, but this claim was a part of the situation referred to in the foregoing section of this memorandum dealing with the plaintiff, R. E. Wilkins, and as noted there, all of such claims were resolved amicably to the satisfaction of all concerned. The court considered the claims of Judy Wallace to be devoid of merit, and they will be denied.

23. S. T. LLOYD.

Lloyd was a 1944 graduate of A & T with a BS in agriculture. He took some graduate work at Cornell University but

did not receive a master's degree. He was first employed by the Extension Service in Union County. In September of 1954 he transferred to Granville County where he remained until his retirement in June, 1975. He claims discrimination in his failure to be appointed county chairman in Granville County in 1971 and in his salary.

Lloyd testified that he did not apply for the position of county chairman in Granville County in 1971 because he didn't think he would be appointed - that he "didn't think that they would appoint a Negro as county chairman at that time." He testified that he believed he was better qualified for the position that the white person who was appointed and that he had approximately three years more tenure than the appointee. Except for his subjective feelings that he probably would not have

been appointed and that he was as well or better qualified for the position than the person who was appointed, there was no evidence whatever to substantive a claim of racial discrimination with respect to this claim. Lloyd's futility claim has previously been rejected (see memorandum filed August 20, 1982 at pages 34-36), but even if the court had accepted Lloyd's "futility" testimony at face value, it would still have been incumbent upon him to establish his qualifications for the position of county chairman of Grenville County in 1971. This he did not do.

With respect to his salary claim, the evidence showed that two of Lloyd's co-plaintiffs, Mary I. Parham and I. W. Murfree, were also employed by the Extension Service in Granville County and that although each of them had less tenure than Lloyd, each was being paid more than

he was. It also appeared that the white agent whose salary was sought to be compared with Lloyd's was making more than a $1,000 a year less than Lloyd at the time of the latter's retirement in 1975.

Lloyd's claim are without merit and will be denied.

24. HERMANDO F. PALMER.

Palmer entered A & T in the fall of 1939 and was enrolled there through the spring of 1943 when he dropped out to take a defense job in the Norfolk Navy Yard following which he served two and a half years in the United States Army Air Corps. He re-entered A & T in the fall of 1946 and graduated with a bachelor's degree in agricultural education in the spring of 1947. He thereafter took graduate courses finally obtaining his master's degree in 1977. He joined the Extension Service in 1955 in Bertie County, transferring to

Johnston County on April 1, 1959 at which time he was promoted from assistant agent to full agricultural agent. He complains that he was not appointed county extension chairman in Johnston County when a vacancy occurred there in 1976 and that a fellow agent, a white, earned more than he.

When the vacancy occurred in the chairmanship in Johnston County in 1976 there were eight applications for the position including Palmer's. The board of commissioners requested that the Extension Service submit three applicants to them for interview, and the Extension Service submitted the names of Frank Baker, white, Leroy James, black, and Bruce Woodard, white. Woodard was chosen by the commissioners to fill the position. A comparison of Woodard's qualifications with those of Palmer showed that each had twenty years of experience with the Extension

Service; that Palmer had passed off thirty hours toward his MS degree while Woodard already had his masters; that Woodard had demonstrated leadership as the county extension chairman in Cumberland County for seven years prior to making application for the position in Johnston; and that Woodard had been recognized by the county commissioners of Cumberland County for outstanding service.

In addition to Palmer's self appraisal of his qualifications a member of the board of commissioners of Johnston County testified that Palmer had a good reputation in the community and as an agricultural agent. Commissioner Holding confirmed that the commissioners exercised their own judgment in these matters and that the idea of limiting the applicants to be interviewed to three was that of the commissioners.

The court can find no inference of racial discrimination arising from this evidence. After all, one of the applicants whose name was submitted to the commissioners of Johnston was black, and although he was not selected to fill the position in Johnston, he thereafter applied for and was appointed to the position of county chairman in Pitt County.

The agent whose salary was sought to be compared with Palmer's is now deceased. When he died Palmer became the highest paid agent in Johnston County. It appeared that the deceased agent had been a specialist in horticulture and that because of the scarcity of such agents they normally commanded higher salaries than other agents.

Palmer's claims of discrimination were not substantiated by the evidence, and they will be denied.

25. W. F. WRIGHT.

W. F. Wright graduated from A & T in 1940 with a BS in vocational agriculture. He served in the Army until 1945 and assumed a position with the Extension Service as assistant county agent for Negro work in Edgecombe County in 1946. He was employed in Richmond County from 1946 to 1951 and he served in Nash County from 1951 to the date of his retirement in December of 1973. He attended graduate school at Cornell University in the summer sessions of 1950 and 1953. During the 1960's he was admitted to graduate school at NCSU to pursue a master's degree in adult and community college education, but he did not complete the work for that degree. He claims that he was discrimi-

nated against in connection with the filling of the county chairmanship vacancy in Nash County in 1972 and also with respect to his salary.

Wright claims that notwithstanding he was working in the same office with the county chairman in Nash County in 1972 that he did not become aware that there would be a vacancy in the chairmanship until he received notice that it had been filled by another. This so-called "futility" claims has been previously rejected as incredible. See memorandum of decision filed August 20, 1982 at pages 34-35. Even so, the only evidence that Wright was as well or better qualified for the position than the person who was named to fill it was his own subjective opinion. The successful applicant for the position, William Shackelford, was shown by the defendants to have had eighteen years'

experience with the Extension Service and a master's degree at the time of his appointment. The evidence showed that he was fully qualified for the position, and Wright's claim that he should have been appointed instead is without merit.

Wright's salary claim is predicated largely upon the theory that had he been appointed county chairman in 1972 he would have made more money. This, of course, is true, but it does not form the basis for a valid claim of salary discrimination. Wright's salary claim has not been substantiated, and it must therefore be denied.

26. EARL G. SWANN.

Swann graduated from A & T with a BS degree in agricultural education in 1949. Thereafter he took a few graduate courses but did not obtain a graduate degree. He entered the employment of the Extension

Service in 1956 and has served in Wayne, Robeson and Alamance Counties. He claims discrimination in the selection of a county chairman to fill a vacancy in Alamance County in 1975.

Questioned by his counsel as to why he did not apply for the position in 1975 Swann replied:

> I had a feeling - this is within myself. And I had noticed so many other black people being denied with more education that I had. So I guess I just said, "I am defeated to begin with." And I did not apply.

He went on to testify that in view of the fact that he was only one year short of reaching full retirement that he would not be interested in a county chairman's position at this time. The evidence would not support a finding that Swann has a legitimate "futility" claim or that his

failure to be appointed as county chairman in Alamance County in 1975 was in any way racially motivated.

With respect to his salary claim Swann cited an instance in Robeson County many years ago in which he was told by a county commissioner that a white agent with comparable qualifications was making $80 a year more than Swann. Swann offered no evidence to show that his qualifications and job performance record were any better than that of comparable white agents. In reputation of Swann's charges of discrimination against blacks defendants offered evidence to show that the highest paid staff member in Alamance County is a black home economics agent.

Swann had failed to prove any of his claims by a preponderance of the evidence, and accordingly they will all be denied.

27. I. W. MURFREE.

Iley Wiley Murfree graduated from Delaware State College, a land grant institution, with a BS degree in agricultural education in 1950. He thereafter took some graduate courses but did not obtain a graduate degree. He was first employed by the Extension Service before transferring to Granville County in October of 1962. He claims that he was wrongfully denied the county chairmanship in Granville County, a position for which he applied in 1976. He also claims discrimination with respect to his salary.

When the vacancy in the county chairmanship in Granville County in 1976 there were to applicants for the position, Murfree and Dorothy Wilkinson, both of whom were agents in the county. Wilkinson was white and had a longer tenure than Murfree. Each of the candidates was

interviewed by the Extension Service following which Grover Dobbins the district extension chairman, recommended to the Board of County Commissioners of Granville County that Murfree be appointed to fill the position. The minutes of the meetings of the commissioners do not reflect this recommendation, but it is not denied that in any event it was made at an informal meeting of Dobbins with the commissioners at which time it was indicated that his recommendation would be accepted and that Murfree would be appointed to fill the vacancy. Shortly thereafter the chairman of the commissioners called Dobbins and told him that upon further consideration it had been decided not to approve Murfree and Dobbins was requested to readvertise the position.

In an effort to convince the commissioners that Murfree was indeed qualified

to fill the position the Extension Service requested that he be appointed as acting chairman until a permanent chairman could be selected, and this appointment was tendered to and accepted by Murfree who served as acting chairman thereafter for a period of approximately nine months. Further efforts to win over the commissioners and obtain the appointment of Murfree as permanent county chairman were unavailing, and the position was finally filled by Frank Baker, whose qualifications for the position were beyond question.

Just how this state of affairs could be construed as an act of racial discrimination on the part of the Extension Service is somewhat baffling to say the least. The fact is that in answer to the defendants' interrogatories Murfree himself disclaimed any discrimination on

the part of the Extension Service, but the apparently had a change of heart after the case reached the trial stage and he took the stand to testify.Be these things as they may, a review of all of the testimony of each witness who testified concerning this aspect of Murfree's claim fails to reveal any evidence which can reasonably be said to substantiate a claim of racial discrimination on the part of the Extension Service.

Similarly Murfree's claim of salary discrimination is without evidentiary support. The evidence showed that in fact he earned more than several agents who had greater tenure. Certain salary comparison exhibits offered on his behalf are not persuasive since there is no evidence reflecting the relative job performances of the agents involved.

All of Murfree's claims are denied.

28. MARY C. MARTIN.

This plaintiff received a BS degree in home economics from A & T in 1949 and a master of science degree in clothing and textiles from the University of North Carolina at Greensboro in 1978. From 1949 to 1960 she was employed principally as a home economics teacher in the public schools of Georgia, South Carolina and North Carolina. She entered the employment of the Extension Service as a home economics extension agent in Mecklenburg County, North Carolina in 1960. She claims that on account of her race she has been repeatedly harassed by Phil Haas, the county extension chairman in Mecklenburg, and that she had been discriminated against with respect to her salary.

The evidence showed that Martin has been embroiled in controversy throughout her tenure with the Extension Service.

She has been placed on probation on two separate occasions and counseled for her poor job performance, and although she has created some successful programs in the field of home economics, she has failed to dispel the unfavorable impressions created by her other actions. For instance, in 1978 show wrote a letter on Extension Service stationery soliciting funds from private businesses for the construction of an extension homemaker center. She took this action without the knowledge or consent of the Extension Homemakers Council or the Extension Service. This unauthorized action had to be countermanded by the Extension Service. This action and additional complaints received by the Extension Service regarding Martin's poor preparation and inferior teaching methods resulted in her being placed on probation. Another source of

complaint with Martin's performance was her action in charging a fee in connection with certain extension courses which she was teaching at Central Piedmont Community College. As a result of these things Martin was placed in a counseling program under Lois Brown, a black district program leader in home economics.

Martin attributes many of her difficulties to personality differences with county chairman Haas, but her conclusory allegations of discrimination on the part of Haas may not be attributed to the Extension Service or to Mecklenburg County which is also a named defendant in this case absent any evidence that either of the defendants condoned or participated in any alleged discrimination.

Martin's claim of harassment on account of her race has not been substantiated by the evidence, and her less than

adequate job performance explains any salary disparities which may exist between her and other agents with comparable tenure, education and responsibilities.

All of Martin's claims will be denied.

29. MARTHA B. THOMAS.

Plaintiff Thomas was graduated from Alcorn A & M University in 1963 with a BS degree in home economics education. She received her master's degree from NCSU in 1978. She was first employed by the Mississippi Cooperative Extension Service for seven years, moving to North Carolina where she accepted employment with the Extension Service here in Wayne County in 1970. She claims discrimination in her salary.

She sought to prove this claim by comparing her salary with that of one Evelyn Raper, a white home economics agent

in Wayne County. The evidence showed that while there was some small difference in the salaries of these two agents, Raper had fifteen years of continuous service with the Extension Service and had taught home economics in Wayne County for four years before beginning her employment with the Extension Service. Additionally, it appeared that Thomas had received a letter of reprimand for failure to get in certain required reports on time.

The evidence submitted on behalf of this employee fell far short of making out a prima facie case of discrimination in salary, and her claim must therefore be denied.

30. ANN COSTON.

AT the trial this plaintiff gave her name as Annie P. Costan Gilmer. A 1970 graduate in home economics from North Carolina central University, Gilmer was

employed by the Extension Service in Pasquotank County from February, 1970, until December 31, 1973, when she resigned. She gave as the reason for her resignation that she did not feel that her salary was commensurate with her skills and job performance, and she based her claim on salary discrimination on the admitted disparity of about $1,200 between her salary and that of a white home economics agent in Pasquotank who had only about a year or so of greater tenure.

Evidence for the defendants showed that while employed by the Extension Service Mrs. Gilmer suffered a personal tragedy in her family when her husband was killed in an accident and that this sharply affected her work. The white agent whose salary was compared with that of Gilmer's was shown to have been performing very effectively during all of

this period. There was no evidence from which the court could infer that the salary disparity in this instance was in any way attributable to racial discrimination, and this plaintiff's claim must therefore be rejected.

31. ESTHER B. ROSCOE.

At the trial this plaintiff testified that her present name is Esther B. Roscoe Winston. She is a 1943 graduate in home economics from Shaw University. After teaching school for three years she joined the Extension Service in 1946 and was continuously so employed until the time of her retirement in 1976. She claimed that she was not permitted to pursue in-service training in 1970 while a white agent was in summer school, and she also complained about her salary.

With respect to the in-service training claim plaintiff's recollection was haze, and the district agent who testified for the Extension Service could not remember a problem arising concerning this plaintiff's in-service training.

Plaintiffs's salary claim was based primarily on her contention that she felt that she had to do more work than her white counterparts. The evidence showed that Winston earned less than some agents with similar degrees and less tenure but also earned more than some white agents who had advanced degrees or greater tenure. There was no evidence as to the relative job performance of the agent whose salaries were compared.

This plaintiff's claim were not substantiated by a preponderance of the evidence, and each of them must therefore be rejected.

32. MINNIE B. TAYLOR.

Plaintiff Taylor graduated from Bennett College with a BS degree in home economics in 1945. After teaching home economics in the public schools for three years she entered the employment of the Extension Service in July, 1949, and remained so employed until the time of her retirement in1979. Her testimony dealt mainly with the matter of club segregation which has been covered in the previous memorandum of decision, but on her own behalf there is a claim that she was not considered for the county chairmanship in Perquimans County when a vacancy occurred in 1970 and that she was not adequately compensated for her services.

With respect to the county chairmanship vacancy the evidence showed that Taylor in fact sponsored one of her co-plaintiffs, W. C. Strowd, for the

position and did not apply for it herself. While the evidence showed that Taylor had received certain awards, citations and honors for her work, it failed to show that she possessed the qualities of leadership and administrative abilities needed to quqalify her for the position of county chairman. This claim which has been advanced on her behalf is without merit.

Plaintiff Taylor testified that in her opinion her job performance was superior to that of a white home economics agent in Perquimans County, but it also appeared that Taylor earned more money than the white agent. The comparison sought to be made between Taylor's salary and that of home economics agents in other counties were not considered relevant. Not only did the evidence fail to show that the responsibilities and job perform-

ances of the agents in other counties may have been different than those of Taylor, as we have been, salaries of agents in all areas of responsibility varied sharply between the various counties.

All of Taylor's discrimination claims will be denied.

33. PENNIE P. BATTLE.

Plaintiff Battle graduated from Virginia State College with a BS degree in home economics, and her first employment was with the Virginia Extension Service in 1936. She was employed by the North Carolina Extension Service from 1940 to 1946, and after an absence of two years she remained there until her retirement in 1974. She claims that she was not made acting county chairman in 1970 and that she was discriminated against with respect to her salary.

Battle testified that the usual extension practice was to appoint an acting county chairman to serve until the vacancy could be filled by a permanent appointment, but she concedes that she did not seek the position of acting county chairman in 1970. Except for her seniority there was no evidence tending to establish her qualifications to fill the position if she had applied for it.

With respect to her salary claim Battle offered comparisons of her salary with the salaries of certain white home economics agents, but the only comparison considered of any significance by the court was the one which compared Battle's salary with that of the other home economics agent in the same county, Mary G. Cowper, a white. Although Cowper's

tenure almost equaled that of Battle, the evidence showed that Battle always earned more than Cowper.

34. JOANN FLEMING.

The married name of this plaintiff is now Joann Fleming Carter. She received a BS degree in home economics education from A & T in 1969 and since that time she has taken advanced courses at NCSU. She entered the employment of the Extension Service on January 11, 1971, and joined as a plaintiff in this suit ten months later because she believed that one of the white agents with less tenure than she had a higher salary.

The white agent whose salary was believed by this plaintiff to be greater than hers while she was employed in Craven County was in fact shown by the evidence to have been earning approximately $1,400 per year less than this plaintiff. The

white agent in Guilford County whose salary was believed by Carter to be greater than hers was in fact shown by the evidence to have earned a master's degree; that in some years her salary was more than Carter's while in others Carter earned more. Even after receiving her master's degree the white agent made only $240 more per year than did Carter.

There is no semblance of merit in this plaintiff's claim.

35. JEANNETT B. SHERROD.

Plaintiff Sherrod received her BS degree in home economics at North Carolina College at Durhan in 1954, taught school for about six years and entered the employment of the Extension Service in Richmond County in April, 1960. After being on pregnancy leave for fifteen months she re-entered the employment of the Extension Service in Union County on

February 1, 1962. At the time of the trial she had just successfully completed work on her master's degree. She claims discriminatory in pay.

Here again the evidence showed that in some instances Sherrod made less than some white agents with less tenure but that Sherrod made more than other white agents with similar tenure. Evidence was lacking as to the relative job performances of the agents whose salaries were compared, but there was evidence that some of the white agents involved had master's degrees and extensive experience as teachers and public school nutritionists prior to joining the Extension Service.

The court is unable to find by a preponderance of the evidence that plaintiff Sherrod has been the victim of discrimination with respect to her salary, and her claim is therefore denied.

36. CARRIE U.LINDSEY.

The married name of this plaintiff is Carrie Lindsey Thompson. She received a bachelor of science degree in home economics education in 1970 from North Carolina Central University, and she has twelve semester hours of graduate work from NCSU in family economics and adult education. While she was a student at North Carolina Central she was recruited for a position with the Extension Service by the district extension chairman, Mrs. Josephine Patterson. She began work in 1970 and transferred in 1972 from Northampton County to Washington County where she is still employed. She testified that she became a plaintiff in this action because of certain working conditions in Northampton County, but her evidence failed to substantiate a claim of any discrimination against her personally by

the Extension Service. In fact she makes no such personal claim with respect to her salary or other conditions of her employment.

The condition of which she complained in Northampton County was that a white secretary typed only for white 4-H agents but not for black agents. She also said that she had personality differences with another agent in that county.

That the Extension Service bears no racial animus toward this plaintiff is perhaps best evidenced by the fact that when a vacancy occurred in the county chairmanship in Washington County in November of 1981 plaintiff Thompson was asked by the Extension Service if she were interested in applying for the position. She declined to do so but was made acting

county extension chairman, the position to which she was still serving at the termination of the trial.

Plaintiff Thompson has failed to prove a case of racial discrimination against the Extension Service.

37. GERALDINE H. RAY.

This plaintiff was a 1969 graduate in home economics from A & T, and she was thereafter employed by the Extension Service in Sampson County until 1971. She then entered graduate school in the University of North Carolina at Greensboro, worked parttime with the Extension Service at A & T and obtained her master's degree in 1925. In 1980 she entered VPI in Blacksburg, Virginia to work on her doctorate.

The principal complaint of this plaintiff was that because of her race she was assigned inferior office facilities

while employed in Sampson County. This claim has heretofore been dismissed as "patently frivolous" and will not be discussed further here. See memorandum of decision filed August 20, 1982, page 39, footnote 29.

With respect to a possible salary claim the evidence showed that while Ray earned less than some agents, she earned more than others who had less tenure. Evidence of her relative job performance was lacking.

All of this plaintiff's claims will be dismissed.

38. MARY I. PARHAM.

Plaintiff Parham graduated from Bennett College in 1940 with a BS degree in home economics. She was the first black agent to be employed by the Extension Service in Granville County. She

worked there until the date of her retirement in 1975. She claims salary discrimination.

Parham testified that in the 1950's a district agent told her that her salary and the salaries of many of her black colleagues were inferior to those of their white counterparts. She undertook to compare her own salary with that of one Dorothy Wilkinson, a white home economics agent, but it appeared that although Wilkinson had a master's degree her salary was only slightly larger than that of Parham. There was no evidence that Parham's job performance was better than that of Wilkinson. Defendants' salary comparisons showed that Parham's salary was greater than that of several white home economics agents, and that in 1971 Parham's salary was in fact higher than

that of any white agent on the staff in Grenville County being exceeded only by that of two black agents.

Parham's claim of salary discrimination has not been sustained.

39. DEBORAH JEAN HART.

40. HERMAN HINTON.

41. BERNICE STATON.

42. MARIAN STATON.

These four named plaintiffs are minors who were represented by their fathers and next friends, James Hart, James Hinton and James Staton. They were alleged to be members of 4-H clubs. Neither they nor their parents appeared as witnesses at the trial, and the only evidence offered on their behalf was that relating to the segregation of 4-H clubs, a subject which has been previously dealt with in the memorandum of decision filed

August 20, 1982. For the reasons there stated the claims of these plaintiffs are dismissed.

CONCLUSION

The individual claims of the forty-two named plaintiffs remaining in the suit have now been carefully considered and found to be wanting in merit sufficient to support a recovery in each instance.[77] For the benefit of the parties some additional observations may be in order.

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[77] The claim of each plaintiff has been considered as if it were a separate lawsuit, and the testimony of each named plaintiff has been reviewed in its entirety together with all other testimonial and exhibit evidence bearing on each individual claim. In addition to the facts found therein the court adopts as its own all uncontested facts set forth in the proposed findings of fact of the parties as indicated under the "red, blue, yellow" system of marking described in the previous memorandum.

While many of the individual claims were not without some semblance of merit, the court was impressed with the fact that many of the plaintiffs disclaimed any discrimination in their answers to interrogatories and showed some reluctance to testify against their employer. The majority of them are still employed by the Extension Service, are doing good work and seem happy in their employment. There was no suggestion that any reprisal or retaliatory action was ever taken against anyone for having joined as a plaintiff in this suit. Contrary to the usual case involving charges of racial discrimination there was no evidence of any overt act of discrimination or any of the usual badges of discrimination such as the use of racial slurs and the like.

All of this serves to reinforce the court's impression that the employment practices of the Extension Service donot differ appreciably from those of the great university system of which the Extension Service is a part. We are dealing with white collar employment at an advanced educational level, and the system is being administered by true professionals whose sole objective is the delivery of the highest quality of services to the people of North Carolina - an objective shared by the true professionals, including the plaintiffs in this action, who constitute the work force necessary to the accomplishment of Extension Service aims. There was not the slightest suggestion in the evidence that the employment decisions of the Extension Service administrators have

not been made and implemented in the best of faith and completely free of any racial bias or prejudice.

Because of its contractual relationships with the one hundred different counties in the state the Extension Service has not always been able to have the last word in employment decisions. And the court is not at all sure that the non-discrimination policies of the Extension Service have been fully shared by each of the boards of county commissioners with which the Extension Service had had to deal.[78] These people are elected

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[78] A prime example of this was seen in the case of I. W. Murfree in Grenville County (named plaintiff No. 27). It will be recalled that after first accepting the recommendation of the Extension Service that Murfree be appointed as county chairman, the commissioners reconsidered and asked the Extension Service to withdraw his name. Not shown by the record but judicially noticed from other proceedings in this court is the fact that Granville is the home of the nationally known activist in racial causes, Ben

officials who may normally be expected to respond to the will of their constituencies, and as regrettable in North Carolina but throughout the nation. Unfortunately, perhaps, only three of the one hundred counties were made parties defendant to this suit, and the court was thus deprived of the benefit of evidence which discovery might have produced had the other counties been made parties.[79]

Chavis, and the county was the scene of bitter racial strife and turmoil in the 60's and early 70's. Admittedly the decision posed for the white commissioners of the county by Murfree's nomination was not an enviable one. Grenville was not one of the three counties made parties defendant to this suit.

[79] This is in no way intended as criticism of the three different sets of attorneys who have represented these plaintiffs at different times during its long history. All of them have shown exceptional ability in this area of the law. It does point up the fact, however, that when a group of plaintiffs as large as the one here involved (seventy-four in number) undertake to prosecute a suit based on the statewide employment practices of one defendant with a hundred separate co-

The evidence shows, however, that the Extension Service itself has endeavored assiduously to comply with the law and where disparities in the conditions of employment have been shown to exist, it has continued to take prompt steps to eradicate them. The court again expresses the hope that the parties to this suit will continue to work together in a spirit of cooperation, cordiality and good will to the end that their mutual aim of bringing a better life to all people in North Carolina may be achieved.

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employees, the litigation not only becomes unwieldly but is indeed virtually unmanageable both for the attorneys and the court.

A judgment order will be entered dismissing the claims of the individual plaintiffs.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

September 17, 1982.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-873

P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D. BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES; HOOVER M. ROYALS; THELMA GRAVES TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M. MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND

ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Appellants

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR., Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

No. 82-1881

P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D.

BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; FLETCHER BARBER; R. E. WILKINS; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES, HOOVER M. ROAYSL; THELMA GRAVES TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M. MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Appellants

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR., Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

No. 82-1927

P. E. BAZEMORE; JAMES E. P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. BWRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D. BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES; HOOVER M. ROYALS; THELMA GRAVES

TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M. MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Plaintiffs

and

THE UNITED STATES OF AMERICA,

Appellant

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR.,

Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

No. 82-2065

P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; L. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D. BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES; HOOVER M. ROYALS; THELMA GRAVES TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M.

MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Plaintiffs

and

THE UNITED STATES OF AMERICA

Appellant

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR., Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County

Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge. (C/A 2879)

Argued April 13, 1983
Decided December 10, 1984

Before WIDENER and PHILLIPS, Circuit Judges, and KELLAM, Senior District Judge*

David B. Marblestone (Walter W. Barnett, Burton Craige, Department of Justice; William Bradford Reynolds, Assistant Attorney General; Charles J. Cooper, Deputy Assistant Attorney General, on brief) for Appellant United States; Eric Schnapper (Jack Greenberg, O. Peter Sherwood; Edward D. Reibman, Cressie H. Thigpen, Jr., Thigpen, Blue & Stephens, on brief) for Appellants P. E. Bazemore, et al; Howard E. Manning, Howard E. Manning, Jr. (Manning, Fulton & Skinner; Millard R. Rich, Assistant Attorney General, on brief) for Appellees.

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* United States District Court for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

This is a race discrimination case in which the individual plaintiffs and the United States appeal from the judgment of the district court which rejected their claims of discrimination by the North Carolina Agricultural Extension Service.[1]

The case was filed in 1971 based on alleged violations of the First, Fifth and Fourteenth Amendments to the Constitution, 4 U.S.C. §§1981 and 1983; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq (prohibiting discrimination in programs receiving federal funds); and 7 U.S.C. §341 et seq (funding authority of the United States Department of Agricul-

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[1] The Extension Service is administratively a part of North Carolina State University, whose chancellor and the Assistant Dean/Director of the Extension Service are also appellees. In addition, the President of the University of North Carolina system, William C. Friday, the Board of Governors of UNC, and Alamance, Edgecombe, and Mecklenburg Counties are appellees.

ture). The United States intervened on the same causes of action. The complaints were both subsequently amended to incorporate alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq (employment discrimination).

After a ten week trial, the district court rendered its decision in two separate opinions issued August 20 and September 17, 1982. In addition to an opinion on the broad aspects of the case such as the pattern and practice claims, the district court, by a separate opinion and order, dealt with and disposed of the individual claims.

On appeal, the individual appellants challenge the rejection of class certification and of their individual claims of race discrimination in their salaries and in the selection of County Extension Chairmen. They also challenge the

district court's refusal to order the integration of the local 4-H clubs and Extension Homemaker clubs. The government and the individual appellants argue that the district court improperly concluded that a pattern or pratice of racial discrimination was not proved with respect to the salaries of county-level employees and State Specialists, or with respect to the selection of the County Chairmen. In addition, they claim that the district court improperly concluded that the Extension Service quartile system, used for merit pay and promotion evaluations, was valid. We affirm.

The district court made extensive factual findings regarding the structure and practice of the Extension Service, so only a brief review of the facts pertinent to the claims on appeal is necessary.

The Extension Service is a division of the School of Agricultural and Life

Sciences of North Carolina State University (NCSU) at Raleigh. Upper level administrative positions in the Extension Service are faculty appointments in the School. At the county level, a County Extension Chairman (County Chairman) is in charge of each county's Extension Service office. In addition to substantive responsibilities among the Service's four program areas (agriculture, home economics, 4-H, and community resource development), he oversees the county's overall extension program and manages county professional staff. The staff consists of assistant, associate, and full agents, who provide services in the program areas. Actual tasks are determined by each county's specific needs based on primary crops, geography, population, etc. Above the county level, a District Extension Chairman is responsible for the overall administration of the several counties

within his district. He is in regular contact with the county professional staff and participates in performance reviews biannually. The Extension Service also has 12 District Program Leaders (responsible for one program in 2 districts) and approximately 25 State Specialists (essentially researchers in particular subjects, such as soybeans, cattle, horticulture, adult education), who are available to assist county staff members with specific programs. Many of the State Specialists work at NCSU in Raleigh.

When a vacancy exists for a County Chairman position, it is noted in the Extension Service monthly announcements. Applicants who meet objective requirements (experiene and education) are interviewed separately by the Director of the Extension Service, his Associate Director, the Assistant Director for County Operations, and the relevant District Extension

Chairman. The group then meets and makes a recommendation on the appointment to the Board of County Commissioners where the vacancy exists. Under a Memorandum of Understanding in effect between the Extension Service anud the counties of North Carolina, the county Boards have authority to reject Extension Service recommendations.

The Extension Service has been in existence since long before the passage of the Civil Rights Act of 1964. Prior to 1965 it was divided into two branches, a white branch and a Negro branch. Both branches reported ultimately to the Director of the Extension Service. On August 1, 1965 (shortly after the effective date of the 1964 Civil Rights Act), the two branches were merged into a single organization. Salary disparities which had existed between the two branches were not immediately eliminated. By 1972,

however, when public employers such as the Extension Service were required to comply with Title VII,[2] it had already been operating on a nondiscriminatory basis for about 6 years. Some pre-existing salary disparities continued to linger on nevertheless.

Since the merger, the Extension Service has set the minimum starting salary for all new county level agents. A salary differential is paid for a master's degree, prior relevant experience, and special skills. Once in the employ of a particular county office, however, each agent's salary is affected by a number of factors, not all within the control of the Extension Service. Each county contributes differing percentages of its local extension agents' salaries, ranging from a

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[2] P.L. 92-261 modified the definition of "person" in Title VII to include governments and governmental agencies as of March 24, 1972.

low of 18% in Camden county to a high of 57% in Forsyth County. The balance of agents' salaries is a combination of state and federal funds, paid by the Extension Service. Both the counties and the state legislature subsequently determine pay increases by their contributions to the salaries, sometimes in the form of a flat sum to each employee, sometimes as percentage raises. There is no uniform procedure for pay increases, and there are not always annual occurrences. In addition to regular salary increases, the State and about 10 counties provide funds for merit pay increases,[3] which are

[3] The United States notes that the distict court, based on the findings of fact submitted by the defendants, found that some counties designate which agent is to receive a merit increase out of its funds. The United States argues this statement is not supported by the evidence, and while the fact that a county designating which agent is to receive an increase is not generally accurate, the fact that counties do give increases to their own agents is amply supported by the record. We have, however, come across one incident in which

awarded based on the past year's job performance. The exact amount is determined by the amount of merit funds available in each county and the agents' job performance during the previous year, as measured by their performance according to the Extension Service quartile system and the Performance Review Guide. Increases to keep more senior employees' salaries above inflationary increases of entry level salaries are set by the Extension Service and also come out of merit funds. Thus, wide variations among salaries can and do develop with the passage of time.[4]

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a county raised its County Chairman's pay in order to keep him from moving elsewhere, and another where a county increased the pay of an agent who was acting county chairman pending selection of a permanent replacement.

[4] For example, County Chairmen salaries in 1971 ranged from $11,601 (Dare County) to $16,588 (Wake County), and similar disparities persist.

Under the quartile system, each employee is placed in one of four quartile groups annually by the District Extension Chairman. Placement is based upon an evaluation of the employee, using the Performance Review Guide. Under that system, employees of like grade and experience are placed in the first, second, third or fourth quartile according to their relative performance during the previous evaluation period, so that an employee in the first quartile has, in general terms, performed better than one in the second quartile, etc. Within each quartile, there is no ranking, however. The Performance Review Guide measures the performance of each employee against goals and objectives and performance of duties called for in his job description. The evaluation under the guide takes into account the observations of the County and District Extension Chairmen, program

leaders and specialists. It also includes an interview or interviews with the agent himself who is required to sign the evaluation made of him according to the Performance Review Guide.

The Extension Service-sponsored local 4-H and Extension Homemaker clubs are established on a wholly voluntary basis at the community level. The Extension Service requires each club to be organized without regard to race and to certify that its membership is open to all races. Although voluntary membership may result in single-race clubs, all activities above the local community level are conducted on an integrated basis (including summer camps and area acitvities). The Extension Service provides services to local clubs equally, regardless of their racial makeup.

We proceed to the specific issues raised on appeal. Our review of the

district court's findings of fact is subject to the clearly erroneous rule. FRCP 52(a); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

A. Class Certification

In the district court the claims for class certification were quite broad, embracing a wide variety of alleged wrongs, which could have been based on race, in the operation of the Extension Service. On appeal, however, the claims have been somewhat narrowed and are that the district court erred in its refusal to certify classes consisting of: (1) all black employees of ... [the Extension Service] on or after November 18, 1971; (2) all black members and potential members of ... [the 4-H and Extension Homemaker Clubs] on or after November 18, 1971; and (3) all County Commissioners in North Carolina who held that position on

or after November 18, 1971. The first two classes mentioned are classes of plaintiffs, and the last a class of defendants.

In arriving at our conclusions, we have had the benefit of, and have taken into account, the findings of the district court at trial, for the plaintiffs pressed the question of class certification from time to time throughout the proceeding as late as argument of the case on the merits. This is not always, or even usually, the case, for the certification of classes at earlier times during a proceeding is many times required and should be as early as practicable. FRCP 23(c)(1). In this connection, we note that the intervention of the government in the case, asserting its broad pattern or practice claims which would have required relief as broadly based as the claimed plaintiffs' classes would have received, made it possible for the plaintiffs to

introduce all evidence they would have been able to introduce had the classes been certified. All the questions on the merits were also presented to the court which would have been presented had the classes been certified. Thus, in a practical sense at least, even if not in a technical one, the complaint on appeal on account of failure of class certification may seem to be of little moment or was made moot by the intervention of the government.

The class of employees seeks to litigate the legality of Extension Service service to single race clubs, the existence of salary discrimination against black employees, and the existence of discrimination in the selection of employees for the position of County Chairmen. While it is doubtful that the legality of Extension Service services to single race clubs is a proper subject of

class representation by employees not members of the clubs, Hill v. Western Electric, 596 F.2d 99 (4th Cir. 1979), it is discussed on its merits at the end of this opinion. The district court declined to certify the class of employees because there was no evidence that there existed any other potential class members, in addition to the named plaintiffs, who had been subjected to any alleged discriminatory employment practices of the defendants. While this finding is not clearly erroneous, it is qualified, as the district court found, by the fact that other witnesses testified on behalf of the pattern or practice claims who would have been members of the class had the pattern or practice claims succeeded. Thus, alone, it may not be sufficient to sustain the district court's ruling on that point.

An alternate reason for denying the class certification of the employees given

by the district court was the lack of typicality of their claims under FRCP 23(a)(3). The salaries paid to the employees are made up from federal monies which are not in question here, appropriations from the state legislature, and the county governments involved. Increases are either across-the-board, merit, or percentage increases and one county in North Carolina has nothing whatsoever to do with the amount of increase given by another county. Thus, the claim of a potential plaintiff against one county will not be typical of the claim of another potential plaintiff against a different county. The same reasoning applies to the selection of the position of the county Chairman. That selection is subject to approval of the county involved, and the fact that one county may discriminate in the selection of its county chairman has nothing to do with

whether another county discriminates. Thus, we feel that the claims are not typical in the sense that they should support a class certification and are nearly like those asserted in Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980), in which we held that promotion and pay decisions subject to almost complete local autonomy in the various offices of Southern Bell throughout North Carolina would not support the typicality requirement under FRCP 23(a)(3) for a statewide class of employees.

The second class of black members and potential members of the 4-H and Extension Homemaker Clubs was not certified as a class because the district court found there was no evidence that anyone was denied services or provided inferior services because of their race; neither, it found, was there any evidence that any black female had been denied membership in

any Extension Homemaker Club or had been denied services or provided inferior services because of her race. The district court further found that in only one case had a black child been denied membership in a 4-H club because of his race, and this resulted in the prompt removal of the offending volunteer worker by the Extension Service. The court found there was no evidence whatever that any other black child was ever denied membership in a 4-H Club, or denied 4-H Club services, or provided inferior services by the Extension Service. It thus denied certification of the class. The plaintiffs do not take exception either to the findings of fact of the district court or to its conclusion that the class should not have been certified on the basis relied upon by that court. They say, however, that the district court misunderstood the issue, which is not whether "all

white clubs reject black applicants on account of race, but what affirmative steps, if any ..., the Extension Service must require as a condition of state services and materials." Parenthetically, no issue is made of "materials" as contrasted to "services." The plaintiffs' statement of their proposition shows the flaw in their claim. While we do not think their present characterization of the issue is correct, but that the district court correctly defined the issue, even if the claim is properly made, it is at once apparent that if there has been no denial of membership or services on account of race, there has been no legally cognizable wrong.

The plaintiffs take exception to the district court's ruling that, under General Telephone Company v. EEOC, 446 U.S. 38 (1980), class action certification is inappropriate and unnecessary in

pattern and practice suits brought by the EEOC and the government. We do not find it necessary and we do not pass upon the correctness of that ruling for the reasons stated just above, which we repeate for emphasis. The government's intervention in this case asserting its broad pattern and practice claims enabled the plaintiffs to have the benefit in the case of all the evidence they would have been able to introduce had their classes been certified. The relief sought by the government was also as broad as that asked for by the plaintiffs. The questions presented were as broad. Thus, the district court's alternate ruling that class certification was unncessary and inappropriate in a pattern or practice case has no practical efect of any kind on the outcome of this case, and we think the resolution of that question is better left for another day.

The district court declined to certify the class of County Commissioner defendant because it found there "... was simply no evidence of any standardized practice among the 100 separate counties in the state to deprive anyone of any rights solely because of race." Again, this finding is not clearly erroneous.

The only way in which the counties were alleged to have acted to deprive plaintiffs of any rights because of race was because of the failure to hire black County Chairmen and because of pay increases of whatever nature granted by the counties. Yet, each county acted individually in its approval or disapproval of County Chairmen recommended for employment by the Extension Service. They acted according to no uniform ruling, and there is no allegation that they did. There is no allegation that the counties had anything to do with the circulation of

information about job openings, or that the circulation of job openings was discriminatory. Indeed, there were no black applicants for county chairmen for most of the vancancies for the job in the counties of the State. With respect to pay, there is only one tiny facet of the district court's fact finding which could have favored the plaintiffs and the government, that counties designated to which individual employees raises were given, and the fact finding has been demonstrated by appellants to be clearly erroneous. Otherwise, pay increases granted by county government were across-the-board, or for merit, or a percentage, and there is neither allegation nor proof that there was any discrimination by the counties in so awarding them.[5] The plaintiffs press their claim for the

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[5] For merit pay increases, see part D, infra.

certification of that class of defendants under FRCP 23(b)(1)(B) that adjudications with respect to one county would as practical matter be dispositive of the interests of other counties. Of course in this case thatcannot be true. If Brunswick County in the southeastern part of the State, for example, had deprived a black applicant employment because of his race or deprived him of pay raises because of his race, that could have nothing to do with whether Ashe County in the northwestern part of the state had done the same thing. In this connection, two cases are persuasive, although decided under FRCP 23(b)(2). In Paxman v. Campbell, 612 F.2d 848 (en banc) (4th Cir. 1980), we held that a class of defendants of 130 Virginia school boards was inappropriate when each was free to adopt maternity leave policies of entirely unknown differences or similarities, it being

uncontradicted there was no statewide policy in force, centrally directed or otherwise. The Sixth circuit followed Paxman in Thompson v. Board of Education, etc., 709 F.2d 200 (6th Cir. 1983), upon the same fact situation obtaining in Paxman. While those two cases were decided under a different part of the class action rule, the principle remains the same, that to have a proper class of defendants in a case such as this there must be either a statewide rule or practice so that relief is available if the rule or practice is invalid, or the adjudication with respect to a member of a defendant class must as a practical matter be dispositive of the interests of the other members of the class as provided in FRCP 23(b)(1)(B). Neither of those conditions is present here.

The decision of the district court declining to certify the class of county

commissioner defendants is thus without error.

B. Individual Salary Claims on Appeal

In addition to the denial of class certification, certain individual appellants appealed their claims of salary discrimination.

These salary claims were rejected by the district court. Simple salary comparisons were introduced to show some white agents who had no longer tenure or no more education earning more than the plaintiffs. Plaintiffs made no showing regarding their job qualifications and job performance which would raise their salary expectations to the level of an inference of discrimination.

In case of individual disparate treatment, the showing of a simple disparity is not sufficient to make a prima facie case of discrimination. The

rule of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 80 (1973), is that plaintiffs must show that they are qualified for an employment benefit which was denied they because of their race. Though evidence of salary disparities is relevant to the question at hand, the plaintiffs must show that they were qualified to be receiving a higher salary in order to shift the burden of production to the employer. Texas Department of Community Affiars v. Burdine, 450 U.S. 248, 252-253 (1981); Larson, 2 Employment Discrimination, §§50.22, 50.31(c) (1983). Lacking any data as to the relative qualifications of these plaintiffs compared to those who allegedly received higher salaries or as to the qualifications demanded by the jobs involved, the district court properly found no prima facie cases of disparate treatment had been made on behalf of these individual plaintiffs.

The individual appellants also raise on appeal the fact that they should be included in a class discriminated against which is the subject of the pattern and practice claims and discussed later in the opinion.

C. Wage Disparity Due to Pre-Act Discrimination

The plaintiffs claim that the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not. We do not think this is the law. "A public employer who from that date forward [date of the Act] made all its employment decisions in a wholly non-discriminatory way did not violate Title VII even if it had maintained an all-white work force by purposefully excluding Negroes." Hazelwood School District v. United States, 433 U.S. 99, 309 (1977). Along the same line, in

United Airlines v. Evans, 431 U.S. 533 (1977), a present seniority and thus salary disparity which existed on account of a previous unlawful termination on account of sex which had resulted in loss of seniority was held not to be actionable when no complaint had been filed by the plaintiff on account of her unlawful termination, although the court acknowledged that "the seniority system gives present effect to a past act of discrimination," 431 U.S. at 558 (1977). To the same effect are Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979) (present effect of uncomplained of racially discriminatory placement on seniority list held not actionable); Trabucco v. Delta Airlines, 590 F.2d 315 (6th Cir. 1979) (present lower pay and fringe benefits resulting from past uncomplained of unlawful reclassification on account of sex held not actionable);

Cates v. Trans World Airlines, Inc., 561 F.2d 1054 (2d Cir. 1977) (present adverse seniority effects resulting from an uncomplained of racially discriminatory refusal to hire are not actionable). See also Schlei and Grossman, Employment Discrimination Law (2d Ed.), p. 1053.

D. Salaries

Much of the dispute in this case centers around salaries of the county agents, whether full agent, associate agent, or assistant agent. The claim is that the salaries of black agents were lower because of their race.

The district court correctly declined to compare or include the salaries of County Chairmen with those of the agents. There is about a $4000 average salary difference between chairman and agent to begin with. The chairman is the head of the county based employees of the Exten-

sion Service. He is not routinely promoted from agent; the method of his selection is entirely different, and counting the salaries of the County Chairmen together with those of the agents for purposes of analysis could only distort the result.

At the outset of this part of the discussion, certain matters admitted or found by the district court and not appealed are important to remember. There is no discrimination in hiring. There has been no discrimination in entrance salaries since 1965. Neither is there discrimination in promotion from assistant to associate to full agent. Pay raises are of three kinds from whatever source, percentage raises, across-the-board raises, and merit raises. There is no discrimination in across-the-board and percentage raises. Everyone gets them.[6]

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[6] In arguing that the district court erred

This leaves only two sources of any discriminatory salary differential, the lingering effects of pre-Act discriminatory pay and the administration of the quartile system of ranking of performance of agents. Under the quartile system, each agent is placed in the first, second, third or fourth quartile, according to his

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in finding no discrimination on the merits of the private plaintiffs' salaries claim, the dissent fails to take account of certain matterns undisputed or not appeased by the plaintiffs. The dissent fails to mention that there has been no discrimination in hiring or in promotions, and no discrimination in entrance salaries since 1965. Because no dispute exists with respect to hiring, promotion, and post-1965 entrance salaries, the only discrimination that could exist would be in the quartile ranking system. As we demonstrate, however, the record does not support a finding of discriminatory effect in the assignment of quartile rankings. The dissent, nonetheless, on this subject as elsewhere addresses itself to certain weaknesses in the district court's opinion rather than the correctness of that court's judgment. Since we review judgments, not reasons, Eltra Corp. v. Ringer, 579 F.2d 294, 298 (4th Cir. 1978), even erroneous reasoning does not require reversal so long as the judgment is correct.

performance for the previous period. Approximately equal numbers of agents are supposed to be placed in each quartile. So, while the placing of an agent in a quartile follows a review of his performance under the Performance Review Guide, because of the necessary division of the agents into four quartiles, the performance of one agent relative to another is bound to be considered. The assignment to a quartile is made by the District Extension Chairman periodically, and merit pay increases, as distinguished from across-the-board and percentage increases, are ordinarily granted to those agents in the top three quartiles, and from time to time an agent's higher quartile rank will result in a higher merit pay increase. Various counties contribute varying amounts of the agents' pay, and indeed, agents are paid by two checks, one from the county, the other from the Extension

Service. Some counties pay higher salaries than do others.

The plaintiffs, as did the defendants, introduced the testimony of a statistical expert. Each of the statisticians had performed a multiple regresion analysis with respect to the salaries of the county agents. The plaintiffs' expert testified with respect to the years 1974, 1975 and 1981, while the defendants' expert testified with respect to 1975 and 1981. A regression analysis is a method for examining the relationships among large numbers of variables. Such an analysis indicates the degree to which changes in the value of one variable corresponds to the value of the other. Barnes, Statistics as Proof, (1983), p. 293 et seq.

The plaintiffs' expert considered the variables of tenure, education, and race, and was of opinion there were statistically significant components of salaries

attributable to race for the years 1974, 1975 and 1981, but he had not included job level or title (assistant, associate, or full agent) in his analysis. When job level was added, he did not find a statistically significant component in 1981. In the most general terms, the defendants' expert agreed for the years 1975 and 1981. He offered isolated data anaylsis, however, which tended to show no discrimination. He had included job title in his analysis. The district court refused to accept the plaintiffs' expert testimony as proof of discrimination by a preponderance of the evidence because the plaintiffs' expert had not included a number of variable factors the court considered relevant, among them being the across-the-board and percentage pay increases which varied from county to county. The district court was, of course, correct in this analysis. It

defies logic to compare the salary of an agent in a county which has granted many or large increases or pays high salaries with one in a county which has granted few or small increases or pays lower salaries. The across-the-board and percentage pay increases granted by various counties in varying amounts, as well as simply paying higher salaries, are bound to have an effect on the salaries of the agents in the various counties. In addition, as such increases accumulate through the years, greater disparity from county to county may certainly be expected rather than less. Percentage increases for all employees also would increase the dollar amount of existing disparities, and dollar amounts are what the statisticians dealt with.

Most of plaintiffs' salary case is built upon the multiple regression analysis of their expert, and we think the

district court was not required to accept that testimony as proof by a preponderance of the evidence. In the first place, the analysis contained salary figures which reflect the effect of pre-Act discrimination,[7] a consideration not actionable under Title VII but permissible to show the general background of the case, or intent, or to support an inference that such discrimination continued. Compare Hazelwood, p. 309 thereof and n.15, with Lehman v. Trout, No. 83-706, 52 L.W. 3628 (1984). Since the data used by the statisticians included pre-Act hires, there is bound to have been a racial component in each of their regression analyses, for the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity

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[7] An inspection of the data bases for the regression analyses shows numerous pre-Act hires, both pre-1965 and pre-1972.

resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all of such disparity. The across-the-board and percentage pay increases granted by a county, as well as counties which simply pay higher salaries, also are bound to flaw the regression analyses since they were not taken account of. It is also apparent that percentage pay raises from whatever source will magnify any existing disparity. Leaving aside for the moment the question of merit pay increases, we do not believe the district court was required to accept the conclusions of the plaintiffs' expert for the reasons we have above set forth.

The conclusion of the district court that the multiple regression evidence was flawed is supported by authority. The purpose of multiple regression is to account for changes in a single variable

through the examination of other variables which might be expected to influence that variable. In the present instance, that single variable is salary. An appropriate regression analysis of salary should therefore include all measurable variables throught to have an effect on salary level. Barnes, Statistics as Proof (1983), p. 339; Fisher, Mutliple Regression in Legal Proceedings, 80 Colum. L. Rev., 702, 74 (1980). However, both experts omitted from their respective analysis variables which ought to be reasonably viewed as determinants of salary. As a result, the regression analyses presented here must be considered unacceptable as evidence of discrimination.

The merit pay increases are another matter. They are granted to agents in the first three quartiles but not in the fourth, so that if there were discrimina-

tion and black employees were assigned to a lower quartile, expecially the fourth quartile, because of their race, there would be a salary disparity resulting on acount of race.

On appeal, appellants rely upon quartile rankings by district and race for only one year, 1981, and we are told in the plaintiffs' brief, p.40, n.40, that for the year 1975 the quartile scores of black employees were relatively better than those of white employees. The 1981 rankings appear in the table just below:

QUARTILE RANKINGS
BY DISTRICT AND RACE

DISTRICT	QUARTILE							
	I		II		III		IV	
	W	B	W	B	W	B	W	B
NC	17	5	16	7	14	12	12	9
NE	12	2	13	3	10	5	8	3
NW	19	1	21	1	17	3	9	4
SE	22	1	18	9	14	6	10	7
SW	20	3	21	2	18	2	12	4
W	16	-	16	-	15	-	13	-
TOTAL	106	12	105	22	88	28	64	27

Lumping together the first three quartiles, for employees in those quartiles are the ones who get the merit pay increases, a standard deviation analysis, with the expected number of black employees in the first three quartiles as 75%, indicates no statistically significant variation in the assignment of quartile rankings. Under the rule formulated in

Hazelwood, "more than two or three standard deviations" would be required to undercut the presumption that employment decisions were being made without respect to race. Hazelwood, p.311, n.17. The following table shows the results here to be well below this threshold.[8]

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[8] The formula used to determine the amount of variation between the actual and expected occurrence percentages in terms of standard deviations is as follows:

$$\frac{n(p-a)}{\sqrt{np(1-p)}}$$

where a is the proportion of blacks actually in the first three quartiles, p is the proportion of all agents that would be expected to be in the first three quartiles, and n is the total sample size. See Moultrie v. Martin, 690 F.2d 1078, 1083, n.8 (4th Cir. 1982).

Total by District
(Expected occurrence in first three quartiles - 75%)

District	Actual Occurrence of Blacks in First 3 Quartiles	
NC	24/33=.7273	Std.Dev.= 0.3012
NE	10/13=.7692	Std.Dev.=(-)0.1599
NW	5/ 9=.5556	Std.Dev.= 1.3469
SE	16/23=.6957	Std.Dev.= 0.6014
SW	7/11=.6364	Std.Dev.= 0.8701
W	No Blacks in 1981	

Even if the expected occurrence in each district is instead the actual percentage of all employees in the district, black and white, which occurred in the first three quartiles in 1981, only one district could have any statistically significanct variation under the Hazelwood analysis, as is shown in the table below. And in that one district (NW) a student's t adjustment shows the variation not to be

of statistical significance under the Hazelwood rule.[9]

Total by District
(Actual occurrences in each district used as norm)

NC Expected Occurrence = 71/92 = .7717

Actual Ratio Blacks = 24/33 = .7273

Std. Dev. from Expected Ratio = .6077

NE Expected Occurrence = 45/56 = .8036

Actual Ratio Blacks = 10/13 = .7692

Std. Dev. from Expected Ratio = .3122

NW Expected Occurrence = 62/75 = .8267

Actual Ratio Blacks = 5/ 9 = .5556

Std. Dev. from Expected Ratio =2.1487

Student's t std. dev. for

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[9] The student's t adjustment is done to accomodate the small sample size found in this district (nine blacks). The student's t distribution teaches that when the sample size is less than approximately thirty, the number of standard deviations must be increased in order to achieve the same significant level. See R. Winkler & W. Hays, Statistics: Probability, Inference, and Decision, 366 (2d ed. 1970).

sample size of 9 at 95%
confidence level = 2.306

SE Expected Occurrence = 70/87 = .8046
Actual Ratio Blacks = 16/23 = .6957
Std. Dev. from Expected Ratio =1.3172

SW Expected Occurrence = 66/82 = .8049
Actual Ratio Blacks = 7/11 = .6364
Std. Dev. from Expected Ratio =1.4103

W No Blacks in 1981.

We are unable to say that these statistics support a finding of discrimintionin the assignment of quartile ranking.[10]

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[10] Indeed, the comparisons made in this statistical analysis constitute a more advantageous analysis for the plaintiffs than might have otherwise been conducted. The present analysis defines the expected occurrence of blacks in the first three quartiles as wither 75% of the actual occurrence ratio of an entire group of a district's agents. A more mathematically correct and appropriate analysis would

define the expected occurrence ratio of blacks in the first three quartiles as the proportion of blacks in a district's population of agents. This ratio would then be compared to the actual proportion of blacks in the first three quartiles. The resulting standard deviations would then provide a more accurate reflection of any difference between the representation of blacks in a district's population of agents and the representation of blacks in the first three quartiles.

This type of comparison should be considered more precise in mathematical terms. Barnes, Statistics as Proof (1983), p., 228. More importantly, it permits the standard deviation analysis to focus on the essential issue of whether blacks are being represented in the first three quartiles in proportions similar to their representation in the population of agents. It is this comparison between the representation of a minority in a suspect group and its representation in a relevant larger population which was the principal focus in Hazelwood, and has been the preferred comparison in employment discrimination and like litigation. Casteneda v. Partida, 430 U.S. 482, 494-497, 97 S.Ct. 1271. 51 L.Ed.2d 4598 (1977) (racial discrimination in grand jury selection); Teamsters v. United States, 431 U.S. 324, 337-338, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (racial discrimination in hiring).

There are only two ways in which the salaries of the county agents may reflect a racially discriminatory effect. The first is because of the lingering effect of pre-Act discrimination, and the second is because of the assignment of quartile rankings, the only aspect of salary computation in which the Extension Service

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In this instance, a comparison of the Hazelwood standard with the standard deviation analysis in the body of the opinion establishes that our use there of 75% or actual occurrence ratios as the expected ratio was done to present the plaintiffs' position in a the best possible light. It is not a precedent to be followed; the Hazelwood standard rather is the rule. The application of a standard deviation analysis to the representation of black agents in the first three quartiles as compared to their representation in a district's agents population fails to produce any standard deviations greater than one. Under the Hazelwood comparison, these results make the evidence even less convincing that quartile assignments were a function of racial discrimination. The table below summarizes the data:

exercised any discretion. The first is not separately actionable, as we have previously set forth, and the second we do not think is supported by the record. Thus, the judgment of the district court with respect to salaries was without error.

E. County Chairmen

The last subject we will dwell upon in any detail is that of selection of County Charimen. The plaintiffs claim that this selection process has been

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District	Expected	Actual	Std.Dev.
NC	.358(33/92)	.338(24/71)	.36
NE	.232(13/56)	.222(10/45)	.16
NW	.12(9/85)	.081(5/62)	.95
SE	.264(23/87)	.229(16/70)	.68
SW	.134(11/82)	.106(7/66)	.67

flawed by racial discrimination, and the government as well as the named plaintiffs claim that the selection process has been flawed by a pattern or practice of discrimination.

Although there may be some repetition, some salient factors are worth repeating. The top administrative position in the Extension Service at the county level is that of County Chariman. Those holding that position have administrative and leadership responsibilities in addition to normally carrying a subject matter program work load depending on the needs of the county. The position is not within the promotional line from County Agent; it must be applied for separately, and the method of selection is neither akin to the hiring procedure for county agents nor to the process of their promotion. It is open to any qualified applicant. The minimum qualifications are

six years (formerly seven) of service with the Extension Service or the equivalent, at least two years of which must have been in service of the North Carolina Extension Service. A master's degree is desirable but is not required, but a bachelor's degree is required. While applicants are not required to be in the employ of the Extension Service, it is obvious that the requirements of two years' employment in that service in North Carolina will have the effect of causing the vast majority of the applications to be from employees of the Extension Service, which is what happened here.

When an impending vacancy becomes known, the District Chairman meets with the County Commissioners and reaches a decision as to the desired qualifications of the prospective applicants with respect to subject matter, knowledge, and competency. This is communicated to adminis-

trative officials in the Extension Service, and an announcement is made of the vacancy, not only to all the county agents but also to the various educational institutions from which the Extension Service recruits personnel. Each applicant meeting the minimum qualifications is interviewed by the district chairman, the assistant director for county operations, the associate director, and the director of the Extension Service. These people then meet and come to a decision as to whom they will recommend to the County Commissioners of the county to fill the vacancy. Sometimes only one applicant is recommended; sometimes more than one is recommended. The County Commissioners then must approve one of the recommended names, for the agreement of the Extension Service and the County Commissioners is required in order to fill the vacancy.

At the outset, we should say that the individual plaintiffs who testified in support of their claims that they had been discriminatorily denied selection to County Chairmen had their claims considered by the district court on evidence particularly applicable to each case. The district court found against each of them. These particular findings of fact and conclusions of law have not even been appealed except in the context of a refusal to find a pattern or practice discrimination. So, there are no cases of actual discrimination to bolster a statistical case. The district court properly placed the burden of proof on the plaintiffs to prove their individual claims. Of course if the pattern and practice claims had been successful, then these plaintiffs, being in the class discriminated against, would have had the benefit of a presumption that they had

been victims of the class discrimination, and the burden of proof would have been shifted to the defendants to prove that such claimants should not recover. Teamsters v. United States, 431 U.S. 324, 359 (1977), construing Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

We will next proceed to an analysis of the statistical information which is relied upon to prove the pattern or practice claims. We must keep in mind that it is the Extension Service whose actions are complained of here, as distinguished from the action of the counties, so it is the "employment decisions," Hazelwood, p.309, of the Extension Service which must be examined. In the context of this case, the employment decisions made by the Extension Service with respect to the selection of County Chairmen were made when the Service either recommended or did not recommend an

applicant for an existing vacancy to the County Commissioners. Thus, it is the act of recommending or not recommending which we examine. The district court found that Title VII was made applicable to the Extension Service in 1972 and that claims under 42 U.S.C. §§1981 and 1983 arising prior to November 18, 1968 woul be barred by the statute of limitations. In this narrow aspect of the case, the bar of limitations prior to November 18, 1968, the plaintiffs, defendants, and the district court are in agreement. The district court found there had been no intentional discrimination proved which was necessary to maintain the case under §§1981 and 1983, and analyzed the statistical evidence from 1972 on.

The appllants claim that, for 1962 through 1981, of 227 appointments to County Chairmen only 6 were black, and that, although blacks account for one-

fourth of the full agents and one-fifth of the professional work force, they have received only 2.6% of the promotions to County Chairmen during that time. Although the claim is not specifically articulated, of course not more than 6% of the existing County Chairmen were black. Thus, they say these statistics only support a finding of discriminatory selection and thus a finding of a pattern or practice of discrimination.

The statistics as thus presented, however, do not tell the full story. There was no position of County Chairman prior to 1962-63, when it was created. A County Chairman was appointed in 1962-63 for each of the white county units, the Service then being segregated as previously related. Black county units did not have county chairmen but worked through the District Extension Chairmen. In 1964 one more, and in 1965, 6 more whites were

appointed County Chairmen. In 1965, the black and white units of the Extension Service were merged and the then existing white chairmen became the County Chairmen of the county units of the integrated Extension Service. There were no appointments in 1966, and in 1967, 5 more white chairmen were appointed. Between 1968 and 1970, 31 more whites were appointed, and, in 1971, 3 more whites and one black were appointed. In March 1972, the Extension Service was placed under Title VII, and since that time the balance of the appointments to County Chairmen have been made. For the purpose of analysis, we assume that the naked figures presente above might support an inference of discrimination in the selection of County Chairmen, but, as Hazelwood, p.309, directs, an employer must be given an opportunity to prove that each of his post-Act employment decisions was made in

a non-discriminatory way. In this respect, the gross statistics we have related above show that at least 104 of the appointments in question (1962-64) were made years prior to the time Title VII was effective and well prior to the time of the Civil Rights Act of 1965 which became effective in 1965. The six 1965 and five 1967 appointments were not actionable since the statute of limitations ran on all appointments before 1968, as the parties agree. Indeed, our examination of the record reveals little or no attempt to present precise data on the appointments prior to 1968. The data for the years from 1968 until the date of trial appears to be fairly complete. The holding of the district court that there was no intentional discrimination shown for the appointments prior to 1972 is not the subject of serious objection on appeal, but we have analyzed the data from

1968 forward so as not to rely upon that finding alone. In this pattern or practice case, we have not excluded post-Act 1965 data and 1967 data from our analyses because barred by limitations; it is just that we do not find it in the record.

The district court found that there had been 77 vacancies since the institution of statewide announcements of vacancies in 1972, and, of that number, blacks had not applied for 59 but had applied for 18 of the vacancies. It found that 18 individual blacks did apply for the 18 vacancies, that 5 of them were selected as County Chairmen by both the Extension Service and the county involved and that their rate of selection was 23% of the applicants. For the same 18 vacancies, the court found that there were 37 white applicants, of which 13 were selected as County Chairmen, or a selec-

tion rate of 35%. It held that since the black rate of selection was 80% of the white that it complied with the EEOC guideline in 29 C.F.R. §1604D which provides that a selection rate of a minority group of more than 4/5ths of the majority rate will generally not be regarded by federal enforcement agencies as evidence of adverse impact.

Appellants complain of the method of analysis of the district court. They say that the district court considered black applicants, not applications, so that those applicants who applied for more than one vacancy are only counted as one instead of two or more, thus increasing the percentage rate of black appointments. They also say that considering the vacancies for which blacks only applied but excluding the vacancies for which whites only applied further flaws the analysis by treating as irrelevant the

vacancies for which whites only applied, but finding evidence of non-discrimination by counting the vacancies for which blacks only applied. They say that the data should be analyzed only for positions for which both blacks and whites applied.

While there may be some jusitification for the method of analysis by the district court, if we should consider that discrimination is against people and not against applications, we think that, without deciding that either method is correct, a comparative analysis is worthwhile. We believe that a correct analysis of the data at this point in one respect, however, should not be either as the district court analyzed it or as appellants would have use do. The Extension Service is not separately responsible for the appointment to fill the vacancy, but it is separately responsible for the recommendation of one or

more of the applicants. Thus, it is the action of the Extension Service upon each application that is its employment decision, and those are the employment decision that we examine. The results of our examination are set out in the table below:

RECOMMENDATION RECORD OF THE NCAES FOR POSITIONS FOR WHICH BLACKS APPLIED, 1972-1981

		Applications		Recommendations	
Year	County	B	W	B	W
1972	No black applications				
1973	Lenoir	2	7	1	3
1973	Iredell	1	3	0	1
1974	Northampton	1	2	1	2
1975	Columbus	1	4	0	1
1975	Martin	1	3	0	1
1975	Wayne	1	4	0	1
1975	Iredell	2	2	0	1
1976	Johnston	2	6	1	2
1976	Union	1	1	0	1

1976	Cumberland	1	0	1	0
1977	Granville	1	2	1	1
1978	Pitt	1	0	1	0
1979	Warren	2	1	1	0
1980	Nash	1	2	0	1
1980	Anson	1	0	1	0
1980	Hertford	1	2	0	1
1981	Vance	1	2	0	1
1981	Hoke	1	1	1	0
TOTAL		23	44	9	18

Results of all vacancies for which blacks applied:

Black Recommendation Rate 9/23=39.1%

White Recommendation Rate 18/44=40.9%

Black Rate as Percentage of White Rate =95.9%

Removing Positions for which only blacks applied:

Black Recommendation Rate 6/20=30%

White Recommendation Rate 18/44=40.9%

Black Rate as Percentage
of White Rate =73.3%

It is apparent from the table, if we consider all of the vacancies for which blacks applied, the Extension Service recommended essentially the same percentage of black applicants as it did white applicants, for a difference of one recommendation would have made the black rate 112.5% of the white rather than 95.6% as shown. But, in accordance with appellants' contentions, if we remove the three vacancies for which blacks only applied and exclude also the vacancies for which whites only applied, the black recommendation rate of 30% of the applicants as opposed to the white recommendation rate of 40.8% shows a black rate of 73.3% of the white. While not within the EEOC guidelines, a difference of one recommendation would have made the black

rate 90.7% of the white because of the small numbers involved, again a figure well within the guideline.

As the table above indicates, we have used 19 vacancies which we find rather than 18 as used by the district court and the appellants. Using the district court's method of caculation for those vacancies, but using applications instead of applicants as appellants suggest, we find that blacks receive 6 of the 19 appointments for which they applied. Six of the 23 black applications were ultimately successful, or 26.3%, while 13 of the 44 white applications were, or 29.6%. Eighty percent of the white rate would be 23.7%, and the black rate of appointment (26.3%) as compared to the white was 89%, well within the EEOC guidelines.

With respect to the parties and the district court, however, we think that the correct method of analysis of this

important data has not been advanced. We do not think that the applicant flow data should be analyzed as appellants wish us to do, using only vacancies for which both blacks and whites applied. Appellants' suggested method, instead of determining whether there was sufficient disparity in the approval rates of members of the class for a sufficient period of time from which discrimination might be inferred against the class, would narrow it down in each instance in the usual case to require an analysis of all the pending applications on the day the particular appointment was made. This would permit either a wide disparity in employment decisions or a wholly evenhanded employment policy to go either unnoticed or unconsidered by the observation of a small number of employment decisions. It also could, and most probably would, require a McDonnell-

Douglas[11] analysis of each vacancy to ascertain as a preliminary matter whether the data with respect to that vacancy should be included in an applicant flow analyses.

We are of opinion and hold that, on the data presented here, an analysis of all of the vacancies and the action on all of the applications for all of the vacancies is the proper way to consider the applicant flow data. See Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974). This data is set out in the next table which appears below. We have used Government Exhibit 69 as the starting place for this table of vacancies and the action of the Extension Service with respect to them. Where no information is shown on that exhibit for other applications, we have assumed the successful

[11] McDonnell-Douglas v. Greene, 441 U.S. 793 (1973).

applicant was the only one unless others as noted were found in those parts of the record we were examining. Where we could find no other recommendations for the vacancy, we have assumed the successful applicant was the only one. All of the vacancies in our table except three appear on Government Exhibit 69.

The above data may be summarized as follows, leaving out of our computations the 3 employees whose race is not shown. Background data for the 11 vacancies occurring in 1965 and 1967 is sparse in the record, and we have not included them for that reasons. Although the uniform notice of vacancies was not commenced until November 1972, Title VII became applicable to the Extension Service in March of that year, so we have included 1972 with subsequent years for the purepose of grouping data in the table and analysis.

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Hoke[12]	1981	W. Featherstone	B	W. Featherstone
		E. Willis	W	
Chowan[13]	1981	M. William	W	M. William
		Z. Harrell	W	
		H. Riddick	W	H. Riddick
Rutherford[14]	1981	S. West	W	
		D. Hennessee	W	
		E. Ware	W	E. Ware
Pamlico[15]	1981	F. May	W	F. May
		R.R. Harris	W	

[12] GX69 (A1736); Tr. 95 (Sasser); GX172.1 at 54-9, 95 (Sasser Dep.).

[13] GX69 (A1736); A. 792, 915-6; Tr. 3666, 4005-7 (Blalock).

[14] GX69 (A1736); Tr. 4922 (Black).

[15] GX69 (A1736).

Chart 1

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Rockingham[16]	1981	F. Green	W	F. Green
Avery[17]	1980	J.M. Pittman	W	J.M. Pittman
		J. Hensley	W	
Clay[18]	1980	J. Reeves	W	J. Reeves
Cabarrus[19]	1980	A.W. Stanford	W	A.M. Stanford
		W. Triplett	W	
McDowell[20]	1980	J.R. Mbe	W	J.R. Mabe

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16 GX69 (A1736); Tr. 4927 (Black).

17 GX69 (A1736).

18 GX69 (A1736).

19 GX69 (A1736).

20 GX69 (A1736).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Vance[21]	1980	D. Cobb	W	D. Cobb
		P. Stainback	W	
		F. Belfield	B	
Ashe[22]	1980	J. Carey	W	J. Carey
		R.F. Breland	W	
		D. Tugman	W	
Hertford[23]	1980	J.W. Dunham	W.	J.W. Dunham
		J. Daughtry	W	
		J.E. Wright	B	

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[21] GX69 (A1736); Tr. 3847, 4375 (Blalock), 4687-88 (Black), 5562 (Dew).

[22] GX69 (A1736); Tr. 92 (Sasser).

[23] GX69 (A1736); Tr. 3833, 4375 (Blalock), 4715-22, 4877 (Black), 5706 (Patterson), 6488 (Hunter).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Perquimans[24]	1980	W.R. Jester	W	W.R. Jester (Juster,Jessup?) K. Bateman
Anson[25]	1980	H. Royals	B	H. Royals
Nash[26]	1980	J. Stephenson	W	J. Stephenson
		F. Belfield	B	
		B. Page	W	

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[24] GX69 (A1736); A. 795, Tr. 3669 (Blalock); Tr. 5548, 5598 (Dew); GX 169.1 at 49-50 (Patterson Dep.).

[25] GX69 (A1736); Tr. 6399-6402 (Yancey).

[26] GX69 (A1736); Tr. 3847 (Blalock), 4682-87 (Black). But see GX 166.1 at 115-16 (Liner Dep. - claims Belfield sole other applicant).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Buncombe[27]	1980	G. Biddix	W	G. Biddix
		J.B. Reeves	W	
		R. Ammons	W	
Montgomery[28]	19??	R.C. Reece	W	R.C. Reece
Surry[29]	19??	J. Waddell	W	J. Waddell
Stokes[30]	19??	S. Hilton	W	S. Hilton
Cleveland[31]	1979	B.F. Spencer	W	B.F. Spencer

[27] GX69 (A1736); Tr. 492-23 (Blalock).

[28] DX67-46 (Montgomery County Folder); Tr. 4923 (Blalock).

[29] DX67-97 (Surry County Folder); Tr. 4925 (Blalock).

[30] DX67-96 (Stokes County Folder); Tr. 4926 (Blalock).

[31] GX69 (A1736).

Chart 5

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Robeson[32]	1979	J. Richardson	W	J. Richardson
		M.K. Dennis	W	
Lee[33]	1979	J. Hall	W	J. Hall
		F.T. Donnell	W	
		C.J. Cameron	W	
Jones[34]	1979	M.C. Small	W.	M.C. Small
		C. Hammond	W	
		F. Barber	B	
Northhampton[35]	1979	B. Rogister	W	B. Rogister

[32] GX69 (A1736).

[33] GX69 (A1736).

[34] GX69 (A1736); Tr. 1935 (Barber), 3859-60, 4375 (Blalock), 4577-82, 4849 (Black).

[35] GX69 (A1737).

Chart 6

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Vance[36]	1979	J. Stephenson	W	J. Stephenson
		P. Stainback	W	
		M. Bowden	W	
New Hanover[37]	1979	C.E. Lewis	W	C.E. Lewis
		T. Dail	W	
		H. Morris	W	
		J.E. Warren	W	
Caswell[38]	1979	L.N. White	W	L.N. White
		D. Pointer	W	
Pamlico[39]	1979	R. Piland	W	R. Piland

[36] GX69 (A1737); Tr. 6393 (Liner).

[37] GX69 (A1737).

[38] GX69 (A1737).

[39] GX69 (A1737).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Warren[40]	1979	L.C. Cooper	B	L.C. Cooper
		G. Koonce	B	
		E. Ballinger	W	
Onslow[41]	1979	D. Baucom	W	D. Baucom
		C. Hammond	W	
		C. Padgett	W	
Bladen[42]	1979	M.K. Dennis	W	M.K. Dennis
		H. Morris	W	

[40] GX69 (A1737); A. 918 (Blalock); Tr. 1893-95 (Cooper), 3858, 4010, 4375 (Blalock), 4703-5 (Black).

[41] GX69 (A1737).

[42] GX69 (A1737).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Moore[43]	1979	C.E. Hammond	W	C.E. Hammond
		T. Colson	W	
		P. Seabolt	W	
		C. Cameron	W	
Davie[44]	1979	W.E. Mainous	W	W.E. Mainous
		Judge A. Pierce	W	
		R. Thompson	W	
Yancey[45]	1979	J. Ray	W	J. Ray
		C. Bickford	W	
		J.G. Hensley	W	

[43] GX69 (A1737).

[44] GX69 (A1737); GX172.1 at 92 (Sasser Dep.).

[45] GX69 (A1737).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Forsyth[46]	1979	J.D. Carroll	W	J.D. Carroll
		W.E. Mainous	W	X
		W. Gurkin	W	W. Gurkin
		A. Stanford (?)	W	
Randolph[47]	1979	T. Baker	W	T. Baker
		D. Peterson	W	
		D. Finette	W	
		R. Freeman	W	
		D. Young	W	
		R. Haines	W	R. Haines

[46] GX69 (A1737); A. 796, Tr. 3670 (Blalock); Tr. 4827-8 (Black), 5598 (Dew); GX172.1 at 54-59, 94 (Sasser Dep.).

[47] GX69 (A1737); A. 793-4, Tr. 3667-8 (Blalock); Tr. 4944 (Black, 5965 (Meldau).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Wayne[48]	1978	W. Townsend	W	W. Townsend
		J.H. Wynne	W	
		W. Lamm	W	
Rowan[49]	1978	J.H. Caudill	W	J.H. Caudill
		R. Hines	W	
Duplin[50]	1978	L. Britt	W	L Britt
		R. Swain	W	
		S.B. Wilson	W	
Pitt[51]	1978	L. James	B	L. James

[48] GX69 (A1737); Tr. 4929 (Black).

[49] GX69 (A1737).

[50] GX69 (A1737); A. 745, Tr. 3617-18 (Blalock).

[51] GX69 (A1737); A. 1004, Tr. 3821, 4375 (Blalock); Tr. 2530 (James).

Chart 11

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Polk[52]	1977	O.R. Ammons	W	O.R. Ammons
		C P. Bickford	W	
		J.M. Groff	W	
Bertie[53]	1977	W.J. Griffin	W	W.J. Griffin
Mitchell[54]	1977	D. Terrell	W	D. Terrell
Alleghany[55]	1977	H. Dosier	W	H. Dosier
		W. Fowler	W	
		W.M. Hearn	W	
		J. Weaver	W	J. Weaver

[52] GX69 (A1737).

[53] GX69 (A1737).

[54] GX69 (A1738).

[55] GX69 (A1738); A. 794, Tr. 3668 (Blalock); Tr. 4928 (Black), 5962 (Meldau); GX167.1 at 13-15 (Meldau Dep.).

Chart 12

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Granville[56]	1977	F. Baker	W	F. Baker
		I.W. Murfree	B	I.W. Murfree
		D. Wilkinson	W	
Watauga[57]	1977	G. Brewer	W	G. Brewer
		B. Fowler	W	B. Fowler
Wilson[58]	1977	C.H. Jernigan	W	C.H. Jernigan
		F. Baker	W	

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[56] GX69 (A1738); Tr. 1613, 1617 (Murfree); A. 792-4, 1004, Tr. 3666-68, 4375 (Blalock); A. 1069, Tr. 4659 (Black); A. 1356-58, Tr. 5829-31, 5876 (Dobbins).

[57] GX69 (A1738); A. 793, Tr. 3667 (Blalock); Tr. 5964 (Meldau); GX 167.1 at 13-15 (Meldau Dep.).

[58] GX69 (A1738). But see Tr. 5863 (Dobbins claims Jernigan sole applicant).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Greene[59]	1977	R.A. Hayes	W	R.A. Hayes
Cumberland[60]	1976	B.T. McNeil	B	B.T. McNeil
Lincoln[61]	1976	D. Choate	W	D. Choate
		A.L. Smith	W	
		H. Waynick	W	
Wake[62]	1976	V.B. Lynn	W	V.B. Lynn
Union[63]	1976	M.C. Howell	W	M.C. Howell
		P.E. Bazemore	B	

[59] GX69 (A1738).

[60] GX69 (A1738); A. 1005, Tr. 4376 (Blalock); Tr. 1397-98, 1420 (McNeil).

[61] GX69 (A1738).

[62] GX69 (A1738).

[63] GX69 (A1738); Tr. 4669-76, 4841 (Black), 5605 (Dew).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Brunswick[64]	1976	R.M. Coleman	W	R.M. Coleman
		D.E. Baucom	W	
		M.K. Dennis	W	
Swain[65]	1976	C.D. Bunn	W	C.D. Bunn
		R. Hyatt	W	
Transylvania[66]	1976	R.R. Hyatt	W	R.R. Hyatt
		R. Hyatt	W	
		J.H. Ray	W	
		D. Winters	W	
		L. Best	W	

[64] GX69 (A1738).

[65] GX69 (A1738).

[66] GX69 (A1738).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Cabarrus[67]	1976	E.E. Bishop	W	E.E. Bishop
		J.P. Bowles	W	
Johnston[68]	1976	B. Woodard	W	B. Woodard
		D. Stanaland	W	
		F. Baker	W	
		H. Lloyd	W	
		P. Westerbeck	W	
		H.F. Palmer	B	
		J. Stephenson	W	
		L. James	B	L. James
Alamance[69]	1975	M.B. Wright	W	M.B. Wright
		R.J. Freeman	W	

[67] GX69 (A1738).

[68] GX69 (A1738); A. 1005, Tr. 3819-24, 4376 (Blalock); Tr. 94 (Palmer), 2529 (James), 4691-94 (Black), 5880 (Dobbins), 6421 (Lynn).

[69] GX69 (A1738).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Buncombe[70]	1975	D.R. Burnette	W	D.R. Burnette
		C.P. Bickford	W	
		J.D. Brooks	W	
		N. Stancil	W	
		R. Hyatt	W	
Stanly[71]	1975	J.F. Simpson	W	J.F. Simpson
		C. Baker	W	C. Baker
		R. Kiser	W	
		F.J. Rivers	W	
Pender[72]	1975	W.F. Walker	W	W.F. Walker
		D.E. Baucom	W	
		J.G. Richardson	W	
		J. Wynne	W	

[70] GX69 (A1738); A. 797, Tr. 3671 (Blalock); Tr. 5547 (Boone).

[71] GX69 (A1738); A. 797, Tr. 3671 (Blalock); Tr. 5547-8 (Boone), 5597, 5602, 5691 (Dew).

[72] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Iredell[73]	1975	K. Vaughn	W	K. Vaughn
		D.O. Ivey	B	
		S.D. Little	B	
		J. Smith, Jr.	W	
Beaufort[74]	1975	M.C. Griffin	W	M.C. Griffin
		H.C. Riddick	W	
		J. Cullipher	W	
		R.M. Pilch	W	
		W.M. Hearn	W	
		G. Sawyer	W	
		S. Warrick	W	
		G. Ambrose	W	
		H. Morris	W	

[73] GX69 (A1739); A. 1005, Tr. 4376 (Blalock).

[74] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Person[75]	1975	F.J. Rivers	W	F.J. Rivers
		M.B. Wright	W	
Tyrrell[76]	1975	F.S. Voliva	W	F.S. Voliva
Wayne[77]	1975	T.S. Godwin	W	T.S. Godwin
		F. Baker	W	
		W. Lamm	W	
		W. Townsend	W	
		B.T. McNeil	B	

[75] GX69 (A1739).

[76] GX69 (A1739); Tr. 4924 (Black.

[77] GX69 (A1739); A. 1005, Tr. 4376 (Blalock).

Chart 19

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Martin[78]	1975	L.L. Allen	W	L.L. Allen
		R.M.K. Edwards	B	
		C.J. Cameron	W	
		P.C. Bryant	W	
Columbus[79]	1975	G.D. McCullen	W	G.D. McCullen
		M.K. Dennis	W	
		H. Lloyd	W	
		H. Morris	W	
		J. Spaulding	B	
Pasquotank[80]	1974	D. Baker	Q	D. Baker
		W.M. Hearn, Sr.	W	

(Continued)

[78] GX69 (A1739); A. 1005, Tr. 3861-2, 4376 (Blalock); Tr. 2779, 2792-97 (Edwards).

[79] GX69 (A1739); A. 1005, Tr. 4376 (Blalock).

[80] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		J.R. Vaughn	W	
		H. Morris	W	
		V. Lynn	W	
81				
Burke	1974	H.L. Miller	W	H.L. Miller
		R.M. Rowden	W	
		Roger Hyatt	W	
		Robert Hyatt	W	
		L. Smith	W	L. Smith
82				
Alexander	1974	B.G. Westbrook	W	B.G. Westbrook
		Roger Hyatt	W	
		K. Patterson	W	
83				
Caswell	1974	M.C. Small	W	M.C. Small

[81] GX69 (A1739); Tr. 5548, 5597 (Dew).

[82] GX69 (A1739).

[83] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Northampton[84]	1974	E.J. Long	W	E.J. Long
		F. Belfield	B	F. Belfield
		D. Eason	W	D. Eason
Wilkes[85]	1974	H.M. Ramseur	W	H.M. Ramseur
		M.B. Wright	W	
Watauga[86]	1974	W.C. Richardson	W	W.C. Richardson
		G.R. Brewer	W	
		R. Haines	W	
		A.A. Greene	W	
		H.B. Hagwood	W	

(Continued)

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[84] GX69 (A1739); A. 1005, Tr. 4376 (Blalock); Tr. 1010, 1014-15 (Belfield), 5639 (Dew), 5866 (Dobbins).

[85] GX69 (A1739).

[86] GX69 (A1740).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		H. Lloyd	W	
		C.D. Bunn	W	
		J.W. Gentry	W	
		P. Guyer	W	
Iredell[87]	1973	A. Stanford	W	A. Stanford
		D.O. Ivey	B	
		H.M. Stoney	W	
		H.W. Myers	W	
Haywood[88]	1973	H. McCall	W	H. McCall
		H.L. Miller	W	

[87] GX69 (A1740); A. 1005, Tr. 4376 (Blalock).

[88] GX69 (A1740).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Lenoir[89]	1973	W.S. Lamm	W	W.S. Lamm
		J.H. Wynne	W	
		W.N. Payton	B	
		G.E. McDaniel	B	G.E. McDaniel
		R.L. Stroud	W	
		W.C. Johnson	W	W.C. Johnson
		T.S. Godwin	W	
		C.H. Jernigan	W	C.H. Jernigan
		F.H. Baker	W	
Montgomery[90]	1973	W. Bowers	W	W. Bowers

[89] GX69 (A1740); Tr. 1355 (Hyatt), 1821-22 (McDaniel), 4654-58, 4816 (Black). But see GX152.1 at 55-58 (Andrews Dep.) (claims W.N. Payton, a black, was also recommended; our table accepts the district court's finding that only McDaniel was recommended).

[90] GX69 (A1740); Tr. 5550 (Dew).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Stokes[91]	1973	J. Barnes	W	J. Barnes
		M.B. Wright	W	
		C.J. Cameron	W	
Catawba[92]	1972	E. Nolley	W	E. Nolley
Davidson[93]	1972	W.C. Holtzman	W	W.C. Holtzman
		W. Johnson	W	
		L. Smith	W	
Tyrrell[94]	1971	F. Rivers	W	F. Rivers

[91] GX69 (A1740).

[92] GX69 (A1740).

[93] GX69 (A1740); GX 150.1 at 3-5 (Dew Dep.).

[94] GX69 (A1740).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Nash[95]	1971	W. Shackelford	W	W. Shackelford
Durham[96]	1971	C. Hodges	B	C. Hodges
Harnett[97]	1971	J. Goff	W	J. Goff
		C. Jernigan	W	C. Jernigan
Gates[98]	1970	Z. Harrell	W	Z. Harrell
		C.M. Grimes	B	
		Mr. Baker	W	Mr. Baker

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[95] GX69 (A1740).

[96] GX69 (A1740); A. 1006, TR. 4377 (Blalock); Tr. 1324-25 (Hyatt).

[97] GX69 (A1740); A. 795, Tr. 3669 (Blalock).

[98] GX69 (A1740); A. 1006, Tr. 4377 (Blalock); Tr. 983-85 (Crimes), 1310, 1316-17 (Hyatt); GX148.1 at 46-8, 85, addendum item 23 (Jones Dep.).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Mecklenburg[99]	1970	P. Haas	W	P. Haas
		M. Irving	W	
		B. Bowers	W	
		W. Flynt	W	
Edgecombe[100]	1970	J. Perry	W	J. Perry
Madison[101]	1970	E. Wise	W	E. Wise
Macon[102]	1970	R. Rollins	W	R. Rollins
		G. Conrad		
		E. Wise	W	

[99] GX69 (A1740); GX162.1 at 12-13 (Haas Dep.).

[100] GX69 (A1740).

[101] GX69 (A1741).

[102] GX69 (A1741).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Greene[103]	1970	W. Johnson	W	W. Johnson
		D. Godfrey	B	D. Godfrey
		F. Baker	W	F. Baker
		X	W	X
Moore[104]	1970	T. Baker	W	T. Baker
Granville[105]	1970	A. Hardee	W	A. Hardee
Perquimans[106]	1970	R. Bryant	W	R. Bryant

[103] GX69 (A1741); Tr. 2248-49, 2252, 2264-66 (Godfrey); GX151.1 at 30-32 (Dobbins Dep.).

[104] GX69 (A1741).

[105] GX69 (A1741); Tr. 1736-37 (Lloyd).

[106] GX69 (A1741); Tr. 828-9 (Strowd).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Transylvania[107]	1970	J. Purser	W	J. Purser
Yancey[108]	1970	W. Bledsoe	W	W. Bledsoe
Henderson[109]	1970	G. Westmoreland	W	G. Westmoreland
Avery[110]	1970	W.W. Avery L. Miller W. Richardson	W	W.W. Avery

[107] GX69 (A1741).

[108] GX69 (A1741).

[109] GX69 (A1741).

[110] GX69 (A1741).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Montgomery[111]	1970	R. Wesson	W	R. Wesson
Chowan[112]	1970	R. Thompson	W	R. Thompson
Craven[113]	1970	E. Simpson	W	E. Simpson
Yadkin[114]	1969	S. Young	W	S. Young
Pitt[115]	1969	E. Yancey	W	E. Yancey

[111] GX69 (A1741). P. E. Bazemore was informed he would be recommended to the county but withdrew due to salary considerations before any action was taken. Tr. 3825-26 (Blalock).

[112] GX69 (A1741). See also Tr. 827 (Strowd) (Thompson sent to Chowan county unwillingly - more like a transfer than open recruitment).

[113] GX69 (A1741).

[114] GX69 (A1741); GX 150.1 at 32-35 (Dew Dep.).

[115] GX69 (A1741).

Chart 30

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Camden [116]	1969	G. Sawyer	W	G. Sawyer
Hertford [117]	1969	E. Register	W	E. Register
Alleghany [118]	1969	W. Corbin	W	W. Corbin
Alleghany [119]	1969	R. Murdock	W	R. Murdock
Orange [120]	1969	E. Pierce	W	E. Pierce

(Continued)

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[116] GX69 (A1741).

[117] GX69 (A1741).

[118] GX69 (A1741); GX150.1 at 32-35 (Dew Dep.).

[119] GX69 (A1741); GX150.1 at 32-35 (Dew Dep.).

[120] GX69 (A1742); A. 795, Tr. 3669 (Blalock); Tr. 1309-10, 1318 (Hyatt), 1417 (McNeil), 6342 (Woodard); GX152.1 at 55-58 (Andrews Dep.).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		F. Emory	B	F. Emory (?)
		S.N. Shelton	B	S.N. Shelton
		B. Woodard	W	
Union [121]	1969	J. Stacy	W	J. Stacy
Cumberland [122]	1969	B. Woodard	W	B. Woodard
		B.T. McNeil	B	B.T. McNeil
		D. Proctor	W	D. Proctor
Alexander [123]	1968	H. Ramseur	W	H. Ramseur

(Continued)

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[121] GX69 (A1742).

[122] GX69 (A1742); Tr. 5837-38 (Dobbins; GX151.1 at 33-34 (Dobbins Dep.).

[123] GX69 (A1742); Tr. 1297 (Hyatt), 1828, 1819-20, 1838 (McDaniel).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		G. McDaniel	B	G. McDaniel
		X	W	X
		Y		Y
Carteret[124]	1968	J. Bunce	W	J. Bunce
Warren[125]	1968	L. Hardage	W	L. Hardage
		L.C. Cooper	B	L.C. Cooper
Guildford[126]	1968	J. Crawfod	W	J. Crawfod
Tyrrell[127]	1968	M. Goodwin	W	M. Goodwin

[124] GX69 (A1742).

[125] GX69 (A1742); Tr. 1309-10, 1322 (Hyatt), 1887-90 (Cooper), 3855-56 (Blalock), 6342 (Woodard); GX152.1 at 55-58 (Andrews Dep.).

[126] GX69 (A1742).

[127] GX69 (A1742).

	Applications		Recommendations	
	B	W	B	W
1968-71	8	45	7	40
1972-81	23	213	9	91
1968-81	31	258	16	131

An analysis of the above data for the years 1968-71 shows 8 black applications with 7 approvals and 45 white applications with 40 approvals, a black approval rate of 87.5% and a white approval rate of 88.9%. The black approval rate was 98.4% of the white. For 1972-81 there were 23 black applications with 9 approvals and 213 white applications with 91 approvals, a black approval rate of 39.1% and a white approval rate of 42.7%. The black approval rate was 91.6% of the white. For the entire period 1968-81 there were 31 black applications with 16 approvals and 258 white applications with 131 approvals,

a black approval rate of 51.6% and a white approval rate of 50.8%. The black approval rate was 101.6% of the white. Thus, considering all of the data which we have for all of the applications shows that for the entire period 1968-81 black applications were approved at a slightly higher rate than were the white applications, and in neither the 1968-71 period no the 1972-81 period, breaking down the data, was the black approval rate lower than 91.6% of the white. Certainly all of this data for either of the two shorter periods, or for the entire period under consideration, is well within the EEOC guideline.

Hazelwood, p.308, n.13, describes applicant flow data as "very relevant," and New York Transit Authority v. Beazer, 440 U.S. 568 (1979), at least expresses a preference for, and perhaps requires, applicant flow data in preference to more

general data. Applicant flow data has been described as the most direct route to proof of racial discrimination in hiring in Hester v. Southern Railway Co., 497 F.2d 1374 (5th cir. 1974), and in United States v. County of Fairfax, Va., 629 F.2d 932, 940 (4th Cir. 1980), we reasoned that "applicant flow data are normally highly relevant." In this case, we think the probative value of the applicant flow data far outweighs the evidentiary value of naked statistics consisting only of numbers of vacancies and the successful applicant by race. Other than the tables we have set forth above and our earlier discussion of vacancies and appointments, there is no other statistical evidence in the record. There is also no finding of any case of discrimination against an individual who sought the position of County Chairman.

When the complete applicant flow data is analyzed, far from showing any discrimination in the appointments to County Chairmen, the only conclusion it will permit is that the Extension Service made its employment decisions with respect to County Chairmen in as evenhanded a way as could be imagined or sought for within reasons. The essence of the analysis of all the applications is that black applications for the position were approved at about the same rate as were white applications. If we assume that a prima facie case was made by the naked statistics consisting of vacancies and successful applicants from 1968 through 1987, it has been completely refuted by consideration of all of the applications, and even if the burden was upon the Extension Service to prove that its employment decisions were free from racial discrimination, it has done so.

We have considered the remaining assignments of error and are of opinion[128] they are without merit.

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[128] The dissent takes issue with the failure of the Extension Service to affirmatively integrate the entirely voluntary membership of local 4-H and Extension Homemaker Clubs in racially mixed communities. The balance of all activities are completely integrated. Absent proof of alleged racial discrimination, the mere existence of all white and all black 4-H and Extension Homemaker Clubs in some racially mixed communities violates neither Title VI nor the equal protection clause of the fourteenth amendment. The record is totally devoid of any proof of discrimination with respect to services provided by any 4-H or Extension Homemaker Club. Moreover, the record shows no proof of any discrimination with respect to membership in any Extension Homemaker Club. While the record indicates one incident in which a voluntary worker told a black child he was not welcome in a white 4-H club the Extension Service at once removed the voluntary worker and admitted the black child to membership in the 4-H club. Especially since the plaintiffs failed to prove their allegations of discrimination, the district court correctly denied the plaintiffs' claim with respect to the alleged affirmative duty to require integrated membership in local Extenshion Homemaker and 4-H Clubs in racially mixed communities.

Even assuming that the record contained evidence of discrimination, it

The judgment of the district court is accordingly

AFFIRMED

PHILLIPS, Circuit Judge, concurring in part and dissenting in part:

I dissent from so much of the judgment and the majority opinion as affirms dismissal of the salary and 4-H Club claims. As to both of those I would find reversible error and remand for further proceedings. I concur in the balance of the judgment.

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would yet be doubtful if plaintiffs are entitled to the relief sought because no evidence in the record exists to show that any plaintiff was denied membership in, or services of, any Extension Homemaker Club or 4-H Club. Consequently, if any party has a complaint it would seem to be the United States, which, significantly, chose not to appeal this issue. We do not decide that issue in this case, however, because the total absence of proof is fatal to plaintiffs' claim.

I.

With regard to the salary discrimination claim, I would hold that the district court erred in its refusal to certify the class ultimately sought by the private plaintiffs; in its decision on the merits that no discriminatory "pattern or practice" had been proved; and in its rejection of the individual claims following its "no pattern or practice" conclusion.

A.

The individual plaintiffs' challenge to the district court's refusal to certify a class consisting of "all black employees of [the Extension Service] on and after November 18, 1971," the date of commencment of the action, is well taken.

There was no possible basis for declining ultimately to certify such a class.

It clearly met the numerosity requirement. The number of black professional employees has been more than one hundred in each of the years involved. The proposed class would be even larger because of turnover during these years. These figures were undisputed.

The other basic criteria for class certification -- commonality of issues, typicality of claims, adequacy of representation -- were equally well established. The district court's refusal, early and late, to certify the class action was, however, obviously based upon a perception that these criteria were not met. Its stated reasons were two. Neither bears scrutiny.

The first was the court's apparent view, confirmed finally by its "no pattern

or practice" conclusion on the merits, that the focus of decisions on salary matters was so far decentralized to the county level that a class action alleging a pattern or practice multi-county in its reach was not warranted. Citing to this court's decision in Hill v. Western Electric Co., 596 F.2d 99, 102 (4th Cir.a 1979) (Hill I), the court concluded that "in employment discrimination cases ... all the plaintiff representatives and all the class members must be from the same work facility ...," and that here "the representative plaintiffs ... come from roughly thirty of the one hundred counties," so that "[i]n no sense can they be deemed to work within the same facility...." App. 24.

This misconceived the holding of Hill I. That case laid down no per se rule preventing class certification in any multi-facility case (even assuming that

the employment relationship here is sufficiently like that in the multi-facility industrial setting of Hill to warrant comparable general treatment). Hill simply applied to the multi-facility setting of that case the general rule that claims of representative plaintiffs must be typical of those of the class, that the representatives must also be situated adequately to represent the interests of class members, and that these criteria, along with the commonality of issues criterion, were not met where multiple facilities were essentially autonomous in respect of the employment decisions directly in issue. This was made plain in our later decision in Stastny v. Southern Bell Telephone and Telegraph Co., 528 F.2d 267 (4th Cir. 1980). There, though certification was again found improper in a multi-facility setting, it was emphasized that the reason was not the setting

itself, but the fact of facility autonomy. Id. at 277, 279 & n.9.

Here, unlike the situations in both Hill I and Stastny, there was abundant proof, both preliminarily and increasingly during the course of trial on the merits, that despite local county contributions to salaries, hence some county-level participation in the salary decisions in issue, the dominant control over total salary levels lay ultimatey in the state-level Extension Service. Thus, although it was undisputed that the level of county contributions to the salaries in question varied over the state, it was also clear from the evidence that ultimate salary level determinations, even of those putative class members working at the county level, were, as a matter of standard practice, subject to approval by Extension Service officials. This is revealed most dramatically in the recogni-

tion by Extension Service officials in 1971 that the race-based salary gaps dating back to pre-1965 overtly discriminatory practices must in prudence and by law now somehow be closed. Those officials plainly recognized and acted upon this necessity as a matter of Extension Service responsibility.

From this it was clear from the outset of this litigation, and only became clearer as it proceeded, cf. Stastny, 628 F.2d at 276, that the dominant issue of fact and law respecting the salaries of putative class members was not-whether there was significant state-level control over those salary levels; that was beyond dispute. The only possibly disputable issue was whether that control was exercised in racially discriminatory ways in accordance with a pattern or practice similarly affecting all members of the putative class. Indeed, in the final

analysis, the district court, in rejecting the "pattern or practice" claims advanced by the individual plaintiffs, recognized the claim's unmistakably appropriate class-action basis by referring to it as a "class claim."

Which leds to the second, and probably more critical, basis for the district court's refusal to certify a salary-claim class. This was the court's stated perception that once the Government had intervened with its own "pattern or practice" claim respecting salaries, the private party class action question was essentially mooted. As the district court saw it, the government's claim, if meritorious, would be as efficacious to the putative class members as would have been a private class action in their behalf.

General Telephone Co. v. EEOC, 446 U.S. 318 (1980), directly refutes this.

General Telephone held that a government pattern or practice suit need not be structured as a Rule 23 class action precisely because to do so would preclude, as class members, individuals who might prefer, and whom Congress intended could, proceed in individual or private class actions, seeking parallel relief. Id. at 333.

It was therefore prejudicial error to decline to certify the salary-claim class sought by plaintiffs.

B.

Whether analyzed from the perspective of the Government's or the private plaintiff's "pattern or practice" claims,[129]

[129] For sake of simplicity, I confine discussion of the salary claims to their grounding in Title VII and the Constitution. The Title VI ground, also available to the Government, must be essentially congruent, being rested on the prohibition against public funding of segregated facilities.

I would then also find reversible error in the district court's rejection of that claim on the merits.

It is helpful at the outset to recall the now familiar features of the two-stage proceeding that has developed under Title VII for the prosecution of "pattern or practice" claims of disparate treatment, whether by private class action or government enforcement action.

In the first stage, the plaintiff need only establish by a preponderance of the evidence that a pattern or practice of disparate treatment has existed as a matter of an employer's regular standard operating procedure. Hazelwood School District v. United States, 433 U.S. 299, 307 (1977); Teamsters v. United States, 431 U.S. 324, 336 (1977); EEOC v. Ford Motor Co., 645 F.2d 183, 197-98 (4th Cir. 1981), rev'd on other grounds, 458 U.S. 219 (1982). At this stage, the plaintiff

need not attempt proof that any particular employees are specific victims of the pattern or practice in order to establish its existence. Teamsters, 431 U.S. at 360. Rather, as is customary, the plaintiff may rely primarily upon statistical evidence, bolstered by such other evidence as he may care to offer. See, e.g., EEOC v. American National Bank, 652 F.2 1176, 1188 (4th Cir. 1981).

Statistical evidence, either alone or in conjunction with other evidence, may carry the plaintiff's burden at this stage, though it is of course subject to rebuttal by demonstration of methodological flaws or inaccuracies. See id. If this burden is carried, the resulting finding of a discriminatory pattern or practice gives rise to an inference that all employees subject to the policy were its victims and are entitled to individually appropriate remedies. Teamsters,

431 U.S. at 362; Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978). This leads to the second stage, in which individual claimants may attempt proof of their entitlement to individual remedies. Teamsters, 431 U.S. at 361-62. In this second stage individual claimants are entitled to a presumption that they are victims of the discriminatory pattern or practice established in Stage I, and the burden is thereupon on the employer to prove the contrary. Teamsters, 431 U.S. at 359 n.45; Sledge v. J.P. Stevens & Co., 585 F.2d 637 n.25 (4th Cir. 1978).

(2)

In this case, the district court rejected the Stage I pattern or practice claim and, in consequence, never reached Stage II proceedings. In doing so, its finding that no cognizable pattern or practice of intentional racial discrimina-

tion in salaries had been established was clearly erroneous. This error is traceable to certain misapprehensions of controlling legal principles and to a failure by the court to accord any weight to certain evidence strongly probative of the claim. See Miller v. Mercy Hospital, 720 F.2d 356, 361 (4th Cir. 1983).

Consideration must start with the undisputed fact that prior to the 1965 merger of white and Negro branches of the Extension Service, the salaries of black professionals were intentionally and quite openly simply set lower than those of white colleagues in the same employment positions. The differential was substantial at all levels and was maintained as a matter of general policy that reflected the cold fact -- as testified by an Extension Service official at trial -- that at that time blacks could simply be

hired and retained at lower salaries than could whites in comparable positions.

Following 1965 merger responsive to the Civil Rights Act of 1964, entry-level base salaries for whites and blacks in comparable professional positions were equalized. But substantial average differentials in all positions continued to exist, and the evidence clearly showed that in time these were reflected in the salaries of both pre-1965 and post-1965 hires. As to the former, because the pre-1965 gaps in base salaries had not been closed; as to the latter, because a significant gap developed once pre-1965 hires had been employed long enough to move up from entry level positions. That these dual strands of substantial salary differentials continued well past 1965 and, more critically, well past 1968 (the earliest limitation date applicable to the

salary claim)[130] was established by undisputed evidence.

Perhaps most dramatic was an internal memorandum prepared in 1971 by Dr. Blalock, then assistant director of the Exentsion Service budget, and an employee of the Service in pre-merger days. Presumably as a result of inquiries or self-prompted concerns about the implications of federal law for the continued maintenance of salary differentials, the memorandum first flatly conceded that "salaries for women and non-white men are lower. Our figures verify." This was attributed to several factors: "the competitive market" (recognized as "not

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[130] In addition to the claim under Title VII, which only arose in 1972, the salary claim was based on Title VI, forbidding since 1965 discrimination in programs receiving federal funds, and on constitutional provisions proscribing intentional race discrimination by state action. As to the latter claims, a limitation period of three years, applied to the action which commenced on November 18, 1971.

acceptable as a reason though"); "tradition"; and "less county support for non-white positions."

Based on this, Blalock had urged in 1971 that action should be taken "as quickly as pos[sible] and preferably before our plan went into Washington." He warned:

> Obviously one of the areas where we'll be checked is on salary. Easy to measure and at least see if there appears to be any [differential].

Blalock had then in fact gone so far as to calculate the salary adjustments needed to close the black/white salary differentials,[131] concluding that increases averaging in the range of $800 to $1100 for black professionals would be required.

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[131] The professional work-force then employed by the Extension Service obviously included both pre- and post-merger hires, a fact manifest to Blalock or anyone else knowledgeable as was he about the recent history of the Service.

There is no dispute that Blalock's general assessment of average salary differentials still existing in 1971 was accurate. But the evidence further disclosed, again without dispute, that though some general adjustments were then put into effect, they did not approach those calculated by Blalock as required to close the gaps. The adjustments were not in fact significant so far as redressing existing race-based differentials. For example, plaintiffs' evidence revealed, again without dispute, that the average gap between white and black aricultural agents at all ranks was then reduced by only $85; that the gap between black and white home economics agents actually increased by $13; and that in three of the six categories of professional employees of the Extension service the average differentials increased in 1971 over those obtaining in 1970. Approximately a year

and a half after the 1971 adjustments, an internal analysis by the Extension Service of the salaries being paid its full agents revealed that those of blacks still averaged $455 less than those paid whites with comparable educational levels and tenure.

From 1971 forward, average differentials between the salaries paid black and white professionals continued to decrease. But the evidence is clear that those average differentials were not substantially removed for home economics agents until 1974 and for agricultural agents until 1976.[132]

That these differentials persisted well into the applicable limitations periods was recognized by the district

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[132] If, as plaintiffs plausibly contend, the average differentials should be adjusted by a tensure longevity factor, the gap-closing dates are substantially later, and may not have been closed fully by trial time.

court, as the evidence compelled that it must be. The court observed of the 1971 "adjustments" -- the first undertaken since 1965 -- that they only began to eliminate the differentials that had originated in pre-1965 overt discriminatory policies. And the district court recognized that the pattern of disparities continued well past that time.

There remained of course the question of motive -- whether the clearly established pattern of salary differentials disfavoring blacks was, during the period of its post-1968 existence, "racially premised." See Teamsters, 431 U.S. at 335. While that motive might possibly have been inferred "from the mere fact of [the] differences in treatment," id. n.15, both sides presented additional evidence of motive in the form of regression analyses of statistical data.

For the government as plaintiff, Dr. Charles Mann presented regression analyses he had done for the years 1974, 1975 and 1981. Certain of these used four independent variables to assess effects upon salaries -- race, education, tenure, and job title. His analyses demonstrated sttistically signifiant racial effects for 1974 and 1975, and statistically insignificant racial effects for 1981. Specifically, it was demonstrated that in 1974 the average black professional earned $331 less than a white professional with the same education, tenure and job title; in 1975, $335 less; and in 1981, still $248 less.

A regressional analysis commissioned by the Extension Service was entirely consistent with that of Dr. Mann for the same time period. Using the same independent variables, it demonstrated a racial

effect of $364-$381 disfavoring black professionals as of October 1974.

Dr. Giesbrecht, an expert witness for the defendants, presented mutliple regression analyses for 1975 and 1981. His results were also consistent with those of Dr. Mann. Using race, education, tenure and job level as indpendent variables, they demonstrated a statistically significant racial effect of $384 for the year 1975; a statistically insignificant racial effect of $310 for 1981. Giesbrecht also presented regression analyses for the same years that added as an independent variable analyses for the same years that added as an independent variable "quartile rankings" that reflected job performance evaluation. For 1975, using this variable in addition to the others increased the race effect to $475; for 1981, it decreased the effect to a still statistically insignificant $142.

Notwithstanding the consistency of these analyses and the testimony of the experts on both sides that they demonstrated statistically significant salary differentials attributable to race that continued at least to some time after 1975, the district court declined to accord them any probative force.[133] The court reasoned, adopting a specific argument by defendants, that the analyses were fatally flawed by their failure to include nine other indpendent variable sposited by defendants as potentially relevant.[134] At the same time, the court

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[133] The district court's rejection of Dr. Mann's regression analysis also, inevitably, involved rejection of Giesbrecht's which concededly employed the same methology and data bases. Supporting the district court's position, the defendants are forced to the position -- which seems clearly taken -- of similarly repudiating their own expert witness testimony.

[134] The suggested variables were as follows:

(1) Performance of agents measured against the agents' plan of work;

apparently rejected as irrelevant to the issue of motive any evidence other than the regression analysis offered by Dr.

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(2) The variations in salaries created by across-the-board state raises with the different percentage of state contributions in each county;

(3) The across-the-board increases in agent salaries by some counties and not in others;

(4) The merit raises provided by the state;

(5) The merit raises provided for by the counties in which Extension Service personnel have no input;

(6) The merit raises provided by the counties with limited or full participation in the merit recommendation by Extension Service personnel;

(7) The range in merit salary increases provided by the counties (0 to 12% in 1981);

(8) Prior and relevant experience; and

(9) Variations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience.

Mann. This appears from the court's conclusion that to the extent plaintiffs had established a prima facie ase "it has only been by viture of ... statistical evidence based on the mutliple regressions of Dr. Mann." Finally, the court concluded that, in any event, the plaintiffs' statistical evidence was undermined by defendants' countering proof of the absence of significant salary differentials.

In all three of these critical determainations, the court was so clearly in error that its ultimate finding of no pattern or practice should not be allowed to stand.

As to the rejection of Mann's regression analyses (and along with it that of defendants' expert) for failure to include a number of other independent variables merely hypothesized by defendants, I completely agree with the

government and the private plaintiffs that to apply such a rule generally would effectively destroy the ability to establish any Title VII pattern or practice claim by this means of proof. There is no authority of which I am aware that applies such a rule. As those parties rightly point out, it will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated by an multiple regression analysis that could be conceived. Merely hypothesizing other possible variables, no matter how rationally, should not suffice where, as here, a statistically significant race coefficient has been demonstrated by a regression analysis employing the most obvious alternative variables of tenure, education, and job position. Leaving out for

the moment the bolstering effect of plaintiffs' non-statistical evidence of a race-based pattern or practice, the effect of the wholly consistent regression analyses here was unmistakably to make out a prima facie case requiring rebuttal by defendants. See Teamsters, 431 U.S. at 360; Chisholm v. United States postal Service, 665 F.2d 482, 496 (4th Cir. 1981). This might have been done, for example, by evidence that the inclusion of other relevant variables would in fact reduce the race-effect coefficient to a

statistically insignificant level. But that simply had not occurred here. For all this record discloses, no one of the variables merely hypothesized by the defendants and relied upon by the court would have had any effect on the race-effect coefficient revealed in the regression analyses of both sides' experts.[135]

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[135] Indeed, one variable -- merit -- merely suggested by defendants as possible explanation for the differential was worked into the regressional analyses. The result, however, was to increase the demonstrated race-effect, rather than decrease it. The Giesbrecht analysis for 1975 incorporated a quartile-ranking variable which presumably reflected merit evaluation. It had the effect indicated.

On this point, the majority opinion's painstaking standard deviation analysis of the effects of quartile rankings on the plaintiffs' claim, slip op. 29-32, does no more than support the district court's rejection of plaintiffs' discrete claim that the ranking system itself was violative of Title VII as an unvalidated test. I am prepared to accept it for that limited purpose without accepting the propriety of the majority's first instance standard deviation analysis of statistical proof based on the size samples here involved, or the majority's apparent

The court also erred in rejecting all evidence other than Mann's regression analysis as probative of a discriminatory

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understanding of the import of the Hazelwood "more than two or three standard deviations" rule. See EEOC v. American National Bank, 652 F.2d at 1192-93 ("Within the range of one to three standard deviations ... we do not see how a acourt can properly find the ... hypothesis [of] discrimination dispelled by [the standard deviation] analysis alone.").

To show, by whatever means, that the quartile ranking system did not itself violate Title VII does not however undercut the probative force of a regression analysis that did not use quartile rankings as an additional independent variable to test for race-effect. In short, that a discriminatory race-effect could not be traced solely to the quartile ranking system obviously does not also show that discrimination did not exist by virtue of other specifically identifiable causes or, indeed, unidentifiable causes. The majority, in fact, asserts that the race-effect demonstrated by all the regression analyses could be attributable only to the quartile ranking system or to the "lingering effects of pre-Act discrimination." Slip op. 33. As well be shown, the fact that such lingering effects are traceable to pre-Act discrimination does not, as the majority believes, insulate it as a discriminatory post-act practice.

pattern or practice. This dissenting opinion is no place to recapitulate all the other evidence that bolstered the inference of intentional discrimination past 1968. But such evidence abounds in the record. Perhaps most practically compelling is the concession by Blalock in 1971 that the pattern of overt race-based discrimination that originated in pre-merger days was then still in effect, in part at least because of "tradition." Coupled with this telling concession against interest was that responsible official's flat warning at the time that remedial action might in prudence by required to avoid difficulty with federal reviewing authorities. It is hard to imagine more weighty evidence of knowing, intentional continuation of acknowledged discriminatory policies.

Other evidence of a purposeful continuation of the practice well past

1971 was presumably disregarded by the district court in view of its stated reliance alone on the Mann regression analysis. Most critical were numerous specific examples of disparate pay between white and black professionals holding the same job positions, having comparable levels of tenure and education, and working in the same county offices at the same time.[136]

The continued existence of this clear pattern was in fact never sought to be rebutted on any basis that could conceivably have been thought to explain the pattern itself, as opposed to occasional specific examples. The defendants' suggestion that somehow merit (as reflected in the quartile rankings), or longevity, or a variance in salary supplements from county to county adequately and fully

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[136] Much of this evidence came directly from county-level Extension Service records.

explained the continued existence of so widespread and substantial a pattern of disparate pay concededly race-based in its origins indeed bordered on the frivolous. On each of these points, the plaintiffs' evidence included numerous illustrations of pay differentials that could not be explained on any of the non-racial grounds merely hypothesized by defendants.[137]

Indeed, anyone looking at this whole record, including some of the district court's own findings and observations could in fairness take only one view of it. It is this: that of course the general pattern of pre-1965 overt discri-

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[137] This evidence, incidentally, completely undercuts the defendants' suggestion, apparently accepted by both the district court and the majority on this appeal, that the regression analyses were flawed because of different salary levels from county to county. The plaintiffs' evidence indisputably established that the general pattern of average differentials existed in both "high-pay" and "low-pay" counties.

mination in salary continued in substantial, if gradually diminishing, degree until at least 1976 and perhaps beyond; that of course, the responsible officials of the Extension Service with responsibility and authority in the matter knew that the pattern continued during that time and that to some degree at least it included a carry-over race-based component from its pre-1965 origins; and that of course, so knowing, those officials allowed it to continue for a time when it lay within their power to remedy it.

If this be, as I am persuaded, the only rational assessment to be made of the evidence in this record, the question arises, and in fairness must be addressed: how then did the district court and the majority here fail so to assess it? In my judgment, the answers are readily found in misapprehensions of controlling legal principle, and not in any essential

disagreement with my assessment of the facts clearly proven.

I identify three such basic legal misapprehensions by the district court.

The first has already been alluded to in Part IA: the court's perception that the salary pattern or practice alleged had not been shown to be class-wide in its reach because of county automomy in salary matters. For reasons there indicated, this view is simply erroneous as a matter of law -- whether applied to the class certification or merits issues.

The second has to do with the relevant time frame within which the existence of a pattern or practice of salary discrimination was to be assessed. That time frame commenced at least as far back as 1972 for the Title VII claims; it commenced as far back as 1968 for the constitutional and Title VI claims. While the district court specifically recognized

this, its findings and conclusions unmistakably reveal at least a preoccupation, as the plaintiffs suggest, or perhaps a sole concern with the question whether a discriminatory pattern or practice continued to exist at the time of trial in 1981.

For example, the court rejected, presumably as irrelevant, a government comparison of black and white salaries earned in 1973 on the basis that it involved differences existing "about ten years ago," though this was well within all the applicable limitation periods. Again, the court in disussing the "seeming salary disparities" revealed by plaintiffs' regression analyses over the period 1974-1981, concluded that on the basis of defendants' evidence respecting the years 1976-1981, the seeming disparities had been adequately explained. This defendants' evidence obviously had nothing to

do with the years 1974-1975 covered by plaintiffs' regressional analysis; and it certainly spoke not at all to the salary pattern before 1974, a time well within the limitation period. The impression is strongly conveyed that the court simply did not consider that it might be compelled to find a discriminatory pattern or practice of discrimination existing for at least some time after 1972 (or possibly 1968) even though it had been rectified by the time of trial. This of course was an erroneous view of the law.[138]

The third misapprehension has, possibly, to do with the nature of the discriminatory intent or motive that must be found to establish a pattern or

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[138] Of course, conditions existing as of trial time would have been highly relevant to the question of the propriety and scope of declaratory and injunctive relief. But plaintiffs' claims, both those of the private parties and of the Government, were of course not limited to prospective relief.

practice claim and, possibly, with legal justifications that might excuse any discrimintory intent found to exist. In a frank and revealing passage, the court opined:

> The Extension Service's problem of bringing black and white salaries into line has been similar to that which faced most business enterprises with a prior history of racial discrimination following the passage of the Civil Rights Act of 1964. Just as it had been found in the area of education that there is no such thing as instant integration, it was soon found in the field of business and industry that there is no such thing as instant equality in employment. Without risking serious disruption of a business by prohibitively costly budgetary alterations and a possible practice of wholesale reverse discrimination it was soon recognized (though not always by the courts) that the adjustments mandated by the law simply could not be made overnight. The dilemma of the Extension Service was further compounded by the fact that its operating funds come from three separate political entities each of which retains a voice

in all major employment decisions.

This passage unmistakably reveals, first off, the court's recognition that a pattern of disparate treatment had been proven; the proferred legal justification or excuse for it that follows would not otherwise be required. Beyond that, it suggests two possible views of the legal significance of the pattern that are equally erroneous in law.

The first is that the intent required to prove a discrimiatory pattern or practice could not be found in the mere continuation of a pattern or practice not originated by those presently charged with its existence. The other is that in any event even the intentional continuation of such a pattern or practice would be legally justified by the extreme difficulties of abandoning it.

Whatever the practical wisdom and accuracy of the court's observations, I agree with plaintiffs' position that nothing in controlling law supports its legal premises. Only those erroneous premises rather than the court's actual fact findings could possibly explain the court's conclusion that no pattern of illegal salary discrimination existed for periods extending well into covered time periods.

This court's opinion affirming the district court's rejection of the salary discrimination claim is, with respect, similarly flawed with basic legal error. Relying principally upon Hazelwood and United Airlines v. Evans, 43 U.S. 533 (1977), the majority holds, in effect, that because the pattern of discriminatory salaries here challenged originated before applicable provisions of the Civil Rights

Act made their payment illegal,[139] any "lingering effects" of that earlier pattern cannot (presumably on an indefinitely maintained basis) be considered in assessing a challenge to post-act continuation of that pattern.[140]

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[139] Plaintiffs' claims were also grounded in the fourteenth amendment, whose effective date of course long predated the origins of the challenged salary pattern. While the majority does not address this point, I assume, for purposes of this discussion, that the Evans principle would apply as well to constitutional claims, so far as it had any application. But, in line with the ensuing discussion in text, I think Evans no more precludes proof of a post-limitation pattern of salary discrimination rooted in a pattern that originated in a pre-limitation period, than Hazelwood precludes proof of a post-Act pattern of salary discrimintion that carries forward differentials originating in the pre-Act period.

For sake of simplicity, I discuss the point in terms alone of the ability to prove a Title VII claim of continuing violation by a pattern or practice that originated pre-Act.

[140] The majority also relies upon this theory to dismiss the probative force of the regression analyses showing statistically significant race effects in 1974 and 1975 salary structures. In the majority's view, the fact that the data used in those

Hazelwood and Evans indeed made it clear that an employer cannot be found liable, or sanctioned with remedy, for employment decisions made before they were declared illegal or as to which the claimant has lost any right of action by lapse of time. For this reason it is generally true that, as the catch-phrase has it, Title VII imposed "no obligation to catch-up," i.e., affirmatively to remedy present effects of pre-Act discrimination, whether in composing a work

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analyses included pre-Act as well as post-Act hires flawed the analyses, since pre-Act hiring decisions could not properly be considered in assessing Title VII liability. Slip op. at 9. With all respect, that the salary data included salaries paid after 1974 to pre-Act hires is beside the point. The claim here is of a post-Act discriminatory pattern or practice in salary payments, not in hiring or work-force composition. That some of the employees claiming post-Act discrimination in salary payments were hired (and paid discriminatory salaries) pre-Act, does not make irrelevant evidence that they, with others, were paid discriminatory salaries post-Act.

force or otherwise. But those cases cannot be though to insulate employment decisions that presently are illegal on the basis that at one time comparable decisions were legal when made by the particular employer. It is therefore one thing to say that an employer who upon the effective date of Title VII finds itself with a racially unbalanced work-force need not act affirmatively to redress the balance; and quite another to say that it may also continue to make discriminatory hiring decisions because it was by that means that its present work force was composed. It may not, in short, under the Hazelwood/Evans principle continue practices now violative simply because at one time they were not.

So, in this case, though there might theoretically be some question as to exactly when the challenged post-Act pattern or practice of salary discrimina-

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tion could be said to have originated, there can be no doubt that it was well established in its challenged form within applicable limitation periods. Indeed, with respect to pay and other "condition of employment" claims, as opposed to hiring and other work-force composition claims, it may well be argued that the "no-catch-up" principle simply has no logical application. Certainly, for example, it could not be contended that an employer could continue to maintain

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[141] Presumably, a wholly post-Act "pattern or practice" could only be found in specific post-Act employment decisions -- either in the form of a general decision to continue a pre=Act pattern or practice as a matter of deliberate post-Act judgment, or in the form of a sufficient number of discrete decisions respecting individual employees to indicate a post-Act pattern or practice that merely continued pre-Act policies into the new period. These can be seen as "continuing" violations, in that they continue pre-Act discrimination rather than merely perpetuate "past effects," see, e.g., Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980).

segregated dining facilities simply because they originated pre-Act.

B.

As both the Government and the private plaintiffs rightly point out, the district court's erroneous conclusion that no pattern or practice had been established made also erroneous its denial of the claims of individual plaintiffs. Those plaintiffs, as members of the class sought to be certified (or as employees properly represented by the Government in its enforcement action) were entitled to have their claims determined with benefit of the "Teamsters presumption," see Teamsters, 43 U.S. at 359 n.45, a benefit denied them by the court's error. They are entitled, therefore, to have the judgments against them on their individual claims reversed and to participate as claimants in Stage II back-pay proceed-

ings. Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637-38 (4th Cir. 1978).

C.

Because of the district court's errors in failng to apply controlling principles of law to the indisputable evidence that defendants knowingly continued a pattern or practice of making and enforcing racially discriminatory salary decisions at least until 1976, I would reverse and remand. The court should be directed to enter judgment declaring that an illegal pattern or practice existed from 1968 until at least 1976, or such later date as the court might now find, and ordering Stage II back-pay proceedings in which individual employees within the class sought to be certified, including the individual plaintiffs whose claims were denied, might prosecute claims with benefit of the

Teamsters-presumption. See EEOC v. American National Bank, 652 F.2d at 1201.

III.

The district court also erred in dismissing on the merits[142] plaintiffs' claim of constitutional and statutory violations in the state's maintenance of racially segregated 4-H and Extension Homemaker Clubs.

The salient facts, essentially undisputed, are these. The 4-H program is a major Extension Service activity, which receives substantial state and federal

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[142] The court refused as well to certify a class of 4-H Club claimants on the same principal basis that it denied the claim on the merits: that no black member of the putative class had actually been denied membership in an all-white club. On this view, there literally was no class of persons who could make the claim the court identified. As later developed on my discussion of the merits of the claim, that simply misconceives the nature of plaintiffs' claim respecting the 4-H Clubs.

funding for whose administration the Extension Service is accountable. One of the program's critical features is the encouragement, financial support, and servicing of voluntarily organized 4-H and Extension Homemaker Clubs throughout the state.

Before 1965 these clubs were deliberately organized and operated, as was the Extension Service in all its features, on a racially segregated basis. In 1965, following passage of the 1964 Civil Rights Act, the Extension Service began and has since intermittently adopted a series of essentially ineffectual measure facially designed to "integrate" pre-1965 clubs and to avoid racial discrimination in the organization and operation of new clubs, as a part of its general program of mandated compliance with the requirement of Title VI of the Act.

The history of the Extension Service's adoption, rejection, compromise, interpretation and administration of those anti-discrimination measures is a checkered and confused one. Its ultimate form, however, can fairly be characterized as a freedom of choice approach to the membership composition of these clubs. Affirmative efforts to achieve effective integration of pre-1965 clubs and to avoid segregation in post-1965 clubs have consisted, on any fair assessment of this record, of announcing to Extension Service agents and to the public that the clubs are open to members of all races and forbidding the denial of membership to any applicant on the basis of race.

The actual effects of these desegregation compliance policies have, however, been minimal so far as the racial composition of local clubs is concerned.[143]

[143] The only claim of illegal discrimination

Despite the emergence of 1972 of some new clubs integrated to some extent, the numbers of such clubs in relation to all-black and all-white clubs remained quite low. For example, in that year there were 22 Homemaker Clubs integrated to some degree, but still 1,378 clubs all white and 466 all non-white. Since 1965, the number of all-white 4-H Clubs has declined by only 8%; the number of single-race 4-H Clubs in ethnically mixed communities has declined by less than 2% since 1972.

As the plaintiffs rightly point out, the district court did not find, nor do the defendants make any serious claim,

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in administration of the 4-H program now pressed by plaintiffs relates to the continuation of these segregated local clubs. As plaintiffs themselves point out, the Extension Service has been able quite effectively to remove the vestiges of discriminatory practice in all other aspects of the Program, including, for example, the operation of summer camps. See note 17, infra.

that the dual system of single race club membership required by the state before 1965 had been significantly disestablished at the time of trial. The court instead concluded, and the defendants here urge in effect, that this constituted no violation of applicable constitutional or statutory law. I disagree.

The district court essentially concluded that so long as all-white clubs were not proven at the time of trial to be rejecting black applicants on the basis of race, no violation either of Title VI or of the Constitution had been proven. This either misapprehended the nature of the plaintiffs' claims, or of the applicable law, or both.

The plaintiffs' claim necessarily has two prongs. The first relates to those present-day single-race clubs that were established before 1965 on a state-imposed segregated basis. As to these, plaintiffs

rely on the fourteenth amendment and on a specific Department of Agriculture regulation promulgated under Title VI and having the force of law:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination. (Emphasis added).

7 C.F.R. §15.3(b)(6)(i). Plaintiffs claim, and I agree, that the evidence clearly shows that the state's essentially hands-off "freedom-of-choice" approach is demonstrably not "affirmative action to overcome the effects of prior discrimination," within the contemplation of this specific regulation, and that neither does it comply with affirmative obligations imposed directly by the Fourteenth Amendment to disestablish formerly segregated state-supported facilities.

Such action as the state has taken in this respect suffers the same vice as did comparable freedom-of-choice plans adopted in ostensible response to the Supreme Court's mandate in Brown v. Board of Education, 347 U.S. 483 (1954); it has proven not to work -- for the same obvious reasons that school freedom-of-choice plans did not work. See Green v. County School Board, 391 U.S. 430 (1968). For the same reasons that judicial remedies were available to insure the use of "other means" having more "realistic promise" to achieve the end compelled by law and constitution in school desgregation, so should a comparable judicial remedy be available here. See id. at 437.

The other prong of plaintiffs' claim relates to single-race clubs formed since 1965 in communities where there demonstrably exists a potential for mixed-race membership. As to those, the claim is

that the state, through the Extension Service, intentionally countenances the continued organization and operation of these clubs, albeit by private parties, on a segregated basis, notwithstanding it has the means further to cause their desegregation.

That such clubs continue to exist is not disputed. That chance alone could account for their single-race composition is not suggested by anyone. The state's position, essentially accepted by the district court, is that no invidious discrimination could be found as the cause except on the basis of evidence that specific black applicants had been denied membership in all-white clubs. Because the evidence was not forthcoming, the district court rejected any claim of present invidious discrimination.

I believe that the court erred in not addressing the question whether a pattern

of invidious discrimination was nevertheless proven independently of specific rejection of black applicants for club membership. That necessary inquiry -- which should be made first instance by the district court -- was simply avoided by the court's view that invidious discrimination could only be proven in the one way not proven. This clearly misapprenhended controlling legal precedents for the means of proving invidious discrimination in this and related contexts. See e.g., EEOC v. American National Bank, 652 F.2d at

1198-99 (discrimination in hiring by word-of-mouth recruitment by presently employed whites); Lea v. Cone Mills Corp., 301 F. Supp. 97, 102 (M.D.N.C. 1969), aff'd in relevant part, 483 F.2d 86 (4th Cir. 1971) (discrimination in hiring by "chilling").

I would reverse the district court's judgment respecting the 4-H Club claim, the remand for further proceedings. As to those clubs which demonstrably existed on a state-imposed segregated basis prior to the effective date of Title VI[144] I would direct entry of a remedial decree which required the state to "come forward with a

[144] Though the composition of particular clubs has of course changed and varied in size over time, so that some difficulty might be encoutered in establishing the continuity of a particular club from its origins in state-imposed segregation, the difficulty of proof is an evidentiary one no greater than that encountered in many other contexts. The defendants' veiled suggestions that the difficulty makes a workable remedy impossible is disingenuous.

new plan ... that promise[s] realistically," see Green v. County School Board, 391 U.S. at 439, to work in achieving the fullest measure of desgregation of those clubs practically possible; with submission of that plan to the court required for review and approval as a condition to further receipt of public funds.[145]

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[145] The district court may well have been led into the error of outright rejection of this claim by assuming that only a much more Draconian remedy than the one suggested here as the appropriate one was possible. In another candid and revealing passage, the court opined

> in North Carolina as well as all other states integration of the races more frequently than not meets with strong resistence. The choice thus posed is whether it is better that the Extension Service continue to provide its much needed services to well over 100,000 North Carolina club members while striving to achieve full integration of the clubs or that it withdraw such services altogether as the government would have it do. The Extension Service has opted for the former, and in so doing this court does not perceive that it has violated the rights of anyone under any law.

As to those all-white clubs formed since the effective date of Title VI that now exist in communities with potential for mixed-race membership, I would direct

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This misconceived both the nature of the plaintiffs' claim and the remedial powers available to vindicate that claim if established. Within the equitable powers of the district court lay a much wider range of possible injunctive remedies than the immediate withdrawal of all state services to all 4-H Clubs found not presently desegregated to a specific degree. Neither Title VI nor the equal protection clause required a specific degree of desegregation of these clubs at any specific time. They required only that intentional segregation be neither directly effectuated nor symbiotically encouraged by state action and that state-imposed segregation still in place be rooted out by state remedial action to the maximum extent and as speedily as possible. As plaintiffs cogently observe, the district court's assessment that no effort by the state beyond a benign freedom of choice plan could be required without risking destruction of the 4-H Clubs is belied by, among other things, the successful efforts by the Extension Service to desegregate all its other activities, including many involving 4-H Club members. The district court underestimated its powers to insure compliance by means less drastic and more adaptable to legitimate state interest than the horrible alternatives suggested by defendants as the only available ones.

specific reconsideration, on a re-opened record, of the claim that they are so maintained by invidiously discriminatory practices knowingly countenanced and encouraged by the state through the Extension Service. In considering that claim, I would direct that evidence other than specific rejection of black applicants be considered and might suffice, if of sufficient probative force, to establish it. And I would direct that if such a claim were established, the court should enter a remedial decree comparable to that above described.

For the reasons, I dissent to the extent indicated.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 82-1873, et al

P. E. BAZEMORE, et al.,

Appellants

v.

WILLIAM C. FRIDAY,
etc., et al.,

Appellees

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Winter, Phillips, Murnaghan, Sprouse and Ervin voted to grant rehearing en banc, while Judges Russell, Widener, Hall, Chapman and Sneeden voted to deny rehearing en banc. Judge Wilkinson did not participate in the decision in this case.

It is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing shall be, and it hereby is, denied.

With the concurrence of Judge Kellam.

FOR THE COURT

Judge Phillips dissents to the denial of rehearing for the reasons expressed in his dissent to the panel opinion.